THE DUAL NATURE OF EMPLOYEE INVOLVEMENT

AN ECONOMIC AND A HUMAN RIGHT ISSUE

Sára Hungler

A DISSERTATION IN LAW FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
PRESENTED TO EÖTVÖS LORÁND UNIVERSITY, FACULTY OF LAW

Budapest, Hungary

November, 2014

Professor Csilla Kollonay Lehoczky, CSc

Supervisor of the Dissertation

STATEMENT OF RESPONSIBILITY

[1]**ADATLAP**

a doktori értekezés nyilvánosságra hozatalához

I. A doktori értekezés adatai

A szerző neve: Dr. Hungler Sára

MTMT-azonosító: 10030847

A doktori értekezés címe és alcíme: The Dual Nature of Employee Involvement – An Economic and a Human Right Question

DOI-azonosító[2]: 10.15476/ELTE.2014.043

A doktori iskola neve: ELTE Állam- és Jogtudományi Doktori Iskola

A témavezető neve és tudományos fokozata: Dr. Lehoczkyné Dr. Kollonay Csilla, egyetemi tanár

A témavezető munkahelye: Central European University

II. Nyilatkozatok

1. A doktori értekezés szerzőjeként[3]

a) hozzájárulok, hogy a doktori fokozat megszerzését követően a doktori értekezésem és a tézisek nyilvánosságra kerüljenek az ELTE Digitális Intézményi Tudástárban. Felhatalmazom az ELTE ÁJ .Doktori Iskola hivatalának ügyintézőjét, Dr. Kovács Mártát, hogy az értekezést és a téziseket feltöltse az ELTE Digitális Intézményi Tudástárba, és ennek során kitöltse a feltöltéshez szükséges nyilatkozatokat.

b) kérem, hogy a mellékelt kérelemben részletezett szabadalmi, illetőleg oltalmi bejelentés közzétételéig a doktori értekezést ne bocsássák nyilvánosságra az Egyetemi Könyvtárban és az ELTE Digitális Intézményi Tudástárban;[4]

c) kérem, hogy a nemzetbiztonsági okból minősített adatot tartalmazó doktori értekezést a minősítés (*dátum*)-ig tartó időtartama alatt ne bocsássák nyilvánosságra az Egyetemi Könyvtárban és az ELTE Digitális Intézményi Tudástárban;[5]

d) kérem, hogy a mű kiadására vonatkozó mellékelt kiadó szerződésre tekintettel a doktori értekezést a könyv megjelenéséig ne bocsássák nyilvánosságra az Egyetemi Könyvtárban, és az ELTE Digitális Intézményi Tudástárban csak a könyv bibliográfiai adatait tegyék közzé. Ha a könyv a fokozatszerzést követőn egy évig nem jelenik meg, hozzájárulok, hogy a doktori értekezésem és a tézisek nyilvánosságra kerüljenek az Egyetemi Könyvtárban és az ELTE Digitális Intézményi Tudástárban.[6]

2. A doktori értekezés szerzőjeként kijelentem, hogy

a) az ELTE Digitális Intézményi Tudástárba feltöltendő doktori értekezés és a tézisek saját eredeti, önálló szellemi munkám és legjobb tudomásom szerint nem sértem vele senki szerzői jogait;

b) a doktori értekezés és a tézisek nyomtatott változatai és az elektronikus adathordozón benyújtott tartalmak (szöveg és ábrák) mindenben megegyeznek.

3. A doktori értekezés szerzőjeként hozzájárulok a doktori értekezés és a tézisek szövegének plágiumkereső adatbázisba helyezéséhez és plágiumellenőrző vizsgálatok lefuttatásához.

Kelt: Budapest, 2014. november 20.

Hungler Sára

---

[1] Beiktatta az Egyetemi Doktori Szabályzat módosításáról szóló CXXXIX/2014. (VI. 30.) Szen. sz. határozat. Hatályos: 2014. VII.1. napjától.

[2] A kari hivatal ügyintézője tölti ki.

[3] A megfelelő szöveg aláhúzandó.

[4] A doktori értekezés benyújtásával egyidejűleg be kell adni a tudományági doktori tanácshoz a szabadalmi, illetőleg oltalmi bejelentést tanúsító okiratot és a nyilvánosságra hozatal elhalasztása iránti kérelmet.

[5] A doktori értekezés benyújtásával egyidejűleg be kell nyújtani a minősített adatra vonatkozó közokiratot.

[6] A doktori értekezés benyújtásával egyidejűleg be kell nyújtani a mű kiadásáról szóló kiadói szerződést.

ACKNOWLEDGMENTS

First and foremost I would like to thank my supervisor, Csilla Kollonay Lehoczky for her interest, flexibility and support even at times when the writing of this dissertation seemed a very difficult, almost unachievable task. I am also grateful for her for giving me expert advice without which it would have gone in a wrong direction.

I am grateful to Marianna Nagy and Pál Sonnevend for their utmost support throughout the years of my doctorate studies and beyond. I thank Andrea Robotka for being an amazing boss.

I would like to thank Tommaso Fabbri and William Bromwich for their comments on earlier versions of the text. I am thankful to Menno T. Kamminga and to EIUC Venice School of Human Rights for opening a new dimension in my research. I would like to thank Katalin Ferber for her insightful comments concerning my research about the Japanese society. I would like to thank Katalin Zalai for her help regarding the archives of the Institute of Political History. I am also grateful to Chris Thomale who facilitated my research at Heidelberg University and at Yale University.

Finally, I would like to thank my parents, Zsuzsa and Tamás Hungler and my husband, Ei Yamashita, who have practically taken up the rising of my sons while I was busy writing.

„die Arbeit ist also der Mensch selbst"
Hugo Sinzheimer

"The end of laws is not to abolish or restrain, but to preserve and enlarge freedom."

John Locke

TABLE OF CONTENTS

PART I
INTRODUCTION

Abstract

Participation at workplaces encompasses different mechanisms used to involve the workforce in decisions at all levels of an organization – whether direct or indirect – conducted with employees or through their representatives. In its various pretexts, the issue of employee involvement has been a recurring theme in economic theories, industrial relations, and human right instruments. The dissertation relies on the rich material which has already been written about participation. Drawing on the finding of these works, the current dissertation sets out to analyse employee involvement from a dual perspective: as an economic tool, which enhances competition and also as a human right, which develops human dignity at workplaces. The dissertation chiefly focuses on forms of direct representation.

The introductory part first concentrates on participation as an element of economic as well as industrial democracy. Second, the notion of participation is analysed from the perspective of ILO and as a part of the European Union's social *acquis*. Distinctive characteristics from trade union representations and from other forms of employee representations are drawn up in this part. Third, hypotheses and the summary of major finding of the research are introduced. Last, an overview on the research methodology is provided.

The second part of the dissertation focuses on the dual nature of employee involvement. First, its origins reaching back to the era of the Weimar Republic are introduced. Second an overview on different economic theories dealing with participation is presented. Third, the concept of participation in various human rights instruments is analysed.

The third part concentrates on the possibility to expand employee involvement to reach global coverage. First the existing hard law and soft law frameworks are introduced with a special focus on the European framework directive on information and consultation (2002/14/EC) and the recast directive on European Works Council. Second is the normative

conclusion of the dissertation. I argue that the extension of the personal scope of the Directives 2002/14/EC and 2009/38/EC could effectively contribute to the promotion of employee involvement as a fundamental right at subsidiaries of Europe-based multinational companies which are located outside of the European Union. Third, the changes concerning employee involvement in Hungary are examined in the light of the recent re-codification of Hungarian labour law.

The fourth part juxtaposes employee involvement systems in Japan and in the state-socialist era in Hungary, examining to what extent employee involvement could function in a collectivist-oriented environment and also to shred light to the important impacts of political, economic and social aspects of democracy on participation. The fifth part concludes the findings of the dissertation.

Chapter 1
Introduction

I Economic Democracy

The right to participate in decisions affecting one's life is a basic value in a democratic society. This principle should be present in all areas of civil society, encompassing political and economic spheres, including workplaces.[7] Robert Dahl argues that "people involved in [certain kinds of human] association possess a right, an inalienable right to govern themselves in democratic process,"[8] and if democratic decision-making is required at the state level, then it is also justifiable at the workplace level.[9] Involvement in decision making which affects one's life is an essential part of human dignity.[10] The 'voice of workers' has traditionally been represented by trade unions through collective bargaining.[11] Employees' right to be directly involved in issues related to the workplace gained recognition much later – the theory of economic democracy has venerable traditions reaching back to the Weimar Republic.

Economic democracy, as a philosophy of socio-economics promotes a more equal distribution of wealth to reduce poverty, unemployement, and starvation. In that sense, it has three aspects: workers' participation, leading to production control; individual security, meaning fair access of every one to common resources, such as water, land or raw materials; and enhanced purchasing power of individuals.

Economic democracy constitutes a core element of Hugo Sinzheimer's work. The central point of his argument was that a subordinated worker has to be recognized as a human being. Whereas the employers' right to command workers at a workplace is inherent in the notion of capital, argues further Sinzheimer, it is important to identify the limits of the power arising from private property. [12] In Sinzheimer views, labour law could serve as a tool to free workers from the abuses of employer power and thereby contribute to the democratization of the economy. Similarly to political democracy, economic democracy could contribute to the emancipation of individual workers *vis-à-vis* economic power.[13] According to Sinzheimer,

---

[7] Cs Kollonay Lehoczky (ed), *A Magyar munkajog II* [Hungarian Labour Law II], (Budapest, Kulturtrade) 151. (Kollonay Lehoczky n 1)
[8] R Dahl, '*Preface to Economic Democracy'*, (University of California Press, 1985).
[9] R Mayer, *Robert Dahl and the Right to Workplace Democracy* (Spring 2001), 63 The Review of Politics, 228.
[10] H Sinzheimer '*The Development of Labour Legislation in Germany'* (1920) 92 Annals of the American Academy of Political and Social Science, Social and Industrial Conditions in the Germany of Today
[11] A Bogg and T Novitz, *'Investigating Voice at Work'* (2011-2012) 33 Comparative Labour Law and Policy Journal, 323.
[12] H Sinzheimer, *Grundzuge des Arbeitsrechts* (1927), quoted by R Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law* (2008) 35 Journal of Law and Society 3, 346.
[13] H Sinzheimer*, Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (1976), quoted by R Dukes supra 346.

participation could enable all economic actors to jointly form the economic conditions of the workplace (and share responsibility related to the jointly made decisions). Therefore, employees would be freed from subordination, and equality would be brought to the economic sphere.

Sinzheimer believed that political and social democracy could only exist if they are accompanied by economic democracy. Sinzheimer witnessed the 'reconstructualization' of labour law: in the name of 'free competition' the employers took advantage of the individualistic regulatory system leaving trade unions vulnerable. Such managerial practices radically reduce the value of work, which could have undesirable effect on the society as a whole. According to Sinzheimer, an economic constitution (*Wirtschaftsverfassung*) could put labour in equal power position to capital by enabling labour to make decisions together with property. Protecting labour has essential importance for the society, as the 'working power of man is not only an individual but also a social asset'. The worker serves the employer directly, but the society indirectly, argues further Sinzheimer; thus the society owes an equivalent return for his service, and this equivalent is the protection itself.

The notion of the 'economic constitution' according to Sinzheimer is what role the state (government) plays or could play in ordering, or constituting, the economic institutions and actors by laws and a legal framework. Thus, the economic constitution encompassed laws that regulate (allow for, encourage, prohibit or constrain) worker participation in decision making.[14] Thus, the economic constitution is much broader than the law of the labour market and also than collective agreements, it encompasses all legal instruments concerning the economic sphere which suggests a concern with democratic participation as a means of emancipating workers. Also, it goes much further than the conservative understanding of constitution as a bill of rights, as Sinzheimer considered it later as an agent of social progress.[15] Through labour law the state recognizes the economic actors and empowers them to act, for example through legally binding norms concerning collective bargaining, and at the same time, sets limits to their power. The notion of economic constitution also clarifies the role of labour law. According to Sinzheimer,[16] the overarching purpose of labour law was[17] to free workers from subordination to employers by securing the freedom of meaningful participation in regulating the economy, while respecting the autonomy of economic actors.

Sinzheimer, on a Kantian recognition of human dignity, argued that the democratization of the industrial sphere through the economic constitution might have brought equality and real freedom for workers – freedom which is not manifested in the way how freedom of contract allowed exploitation, but freedom from subordination in employment relations.

The idea of economic democracy also gained significance as a criticism of formal democracy, because, as argued, democracy cannot be divided from the economic structure in which it exists.[18] The concept of economic democracy is often juxtaposed with industrial

[14] R Dukes,'The Labour Constitution: The Enduring Idea of Labour Law (Oxford, 2014, OUP), 5-6.
[15] Ibid.
[16] Correspondingly, it is also reflected in the works of Otto Kahn-Freund.
[17] It is argued that Sinzheimer underestimated the weight of conflicts derived from the ambigious role of the Weimar Republic regarding state intervention in industrial relations.
[18] See, for example, A Sen, *Development as Freedom* (Oxford, 1999), especially 14-34.

democracy, as it promotes workers' participation in corporate governance with a view of democratizing employment relations within the companies.[19]

It is argued that modern property relations externalize costs, subordinate the general well-being to private profit and deny the justifiability of democratic voice in economic policy decisions.[20] To ensure economic empowerment, most proponents claim that basic necessities and sufficient purchasing power should be guaranteed to everybody, and local control should be exercised over economic decisions.[21] The classical liberal argument claims that ownership and control over the means of production should belong to private firms and can only be sustained by means of consumer choice, exercised daily in the marketplace.[22] In contrast, proponents of economic democracy generally argue that modern capitalism periodically results in economic crises characterized by deficiency of effective demand, as society is unable to earn enough income to purchase its output production. Thus, economic democracy could mitigate the gap between demand and supply.[23] Economic democracy is argued to secure economic rights and to support access to political rights as well. Both market and non-market theories of economic democracy have been proposed to encompass economic democracy. This dissertation will in particular examine the theories of Hugo Sinzheimer and Amartya Sen, and will also provide an overview on relevant economic theories related to participation.

II Industrial Democracy

Although they are related in many ways, industrial democracy and economic democracy convey different meanings. These differences are much related to diversity in industrial traditions. Historically, industrial democracy became an effective force within workers' movement primary as an idea of representative democracy.[24] The principle of industrial democracy implies replacement of unilateral regulations with joint decisions on matters concerning workplaces or employment conditions. Thus, it is a socio-economic philosophy which proposes that citizenship rights in employment allows the workforce to partially or completely participate in the running of an industrial or commercial organization.[25] Industrial democracy could be divided into two categories, representative or indirect and direct forms of influence.

---

[19] O Kahn-Freund, *Industrial Democracy* (1977) 6 Industrial Law Journal, 65-84; Lord Wedderburn, *The Land of industrial Democracy* (1977) 6 Industrial Law Journal, 68-89.
[20] J W Smith, *Economic Democracy: The Political Struggle for the 21st century* (Radford, 2005, Institute for Economic Democracy Press).
[21] D Schweickart, *After Capitalism (New Critical Theory)* (Rowman & Littlefield, 2002).
[22] L V Mises, Socialism: *An Economic and Sociological Analysis* (Yale University Press, 1953).
[23] D Harvey, *The Enigma of Capital and the Crises of Capitalism* (Oxford, 2010, Oxford University Press).
[24] W Müller-Jentsch and N Levis, 'Industrial Democracy: From Representative Codetermination to Direct Participation' (1995) 25 International Journal of Political Economy 3, 50-60. For an opinion contrary to this theory see, S and B Webb, *'Industrial Democracy'* (London, 1897). The Webbs considered industrial democracy as collective bargaining within trade unions.
[25] Casale (n 8) 104.

Industrial democracy is a system that increases the extent and means of employees are being involved in their work environments. In a broad sense it could include participation in setting agendas, implementation of various policies, or election of board of directors. It is argued that industrial democaracy has great many benefits, such as improved communication, more effective policies and better morale of employees. Industrial democracy also fosters engagement; employees tend to implement policies better if they are not only in charge for execution of them, but are also part of the decision-making process. By that, industrial democracy reduces insubordination, because employees feel that even though decisions and orders are imposed on them, they could make their own choices which fit their personal interests the best.

Industrial democracy challenges both the authoritarian and bureaucratic structures of a capitalist enterprise and the centralized regime in the state socialist planned economies. In that sense participation was also dissolution of the Taylorist-Fordist model, which favoured flat hierarchies and direct orders and it takes into account that workers are not only bearers of labour power, but members of democratic societies from which they derive a set of civil, political and social rights.[26] The Hawthorne studies evidenced in the early 20th century the ability of employees and employee groups to exercise informal control of productivity.[27] The recognition of legitimate power for employees paved the way for the development of the industrial democracy concept.[28]

The paradigmatic transformation brought new production concepts and management techniques,[29] which offered more leeway for self-regulation and responsibility to rank-and-files. Such techniques also supported the legitimacy of management at workplaces. However, implementation of participative models has usually been made with an eye toward securing higher level of competitiveness.

It is argued that without participation, workers' alienation is inevitable at workplaces, which, on a long run, involves that also as citizens they become indifferent towards public affairs, which is a real danger to democracy as a whole.[30] Critics claim, however, that participation is often used as a manipulative device used by management to weaken trade unions and control workers' mood or morals.[31] Sceptical arguments claim that even in extensive worker self-management regimes, like the Mondragon cooperatives in Spain, the decentralized state socialist model of Yugoslavia or the Japanese self-managed work-groups, the control of power retain.

---

[26] T H Marshall, *'Citizenship and Social Class'* (Cambridge, 1950) and W Müller-Jentsch and N Levis, *'Industrial Democracy: From Representative Codetermination to Direct Participation*' (1995) 25 International Journal of Political Economy 3, 57.

[27] E Mayo, '*The Human Problems of an Industrial Civilization'* (New York, 1933, Macmillan).

[28] Most notably see the 'empowerment theories', which claim the positive effect of voluntary redistribution of managerial power. They are based on the assumption that employees can make important contributions to the organization other than those confined to tasks and roles. For more detailed arguments see the works of Argyris, Ouchi, Covey and Mc Arthur. For participative management theories see for example the researches of Likert, Fernie and Metcalf, Keller, or Strauss.

[29] See for example the works of Chris Argylis on the evolution, especially 'Understanding organizational behavior' (1960, Tavistock).

[30] O Kahn-Freund, *Trade Union Democracy and the Law* (1961), 22 Ohio St. L.J. 5

[31] For a comprehensive overview on the critical approaches arising in the 1960s, see E Rehnman, *Industrial Democracy and Industrial Management – A critical essay on the possible meanings and implications of industrial democracy* (London, 1968, Tanistock), especially 67-69 and 90-91.

III Notion of Participation

Participation in decision-making processes could exist in many different ways, starting from the mere right to be informed, it could also include consultation, and, the strongest influence could be provided by means of co-determination. Employee participation could be of a different nature, depending on the models of workers representation, the public or private nature of the employment relationship, the organizational dimensions of the enterprises and markets, as well as the relationship between the legislative and contractual sources. Naturally, participation reflects the industrial relations systems within which it is applied. The increasing globalization of capital, product and labour markets has increased the need for effective and functioning models of participation. However, the co-existence of the different systems has led to paramount difficulties in defining the meaning, and especially the boundaries of employee participation both in academia and in practice.

A Definition of Participation by ILO

The subject of employee involvement at workplaces has for many years been of interest of the ILO in the production of regulatory provisions.[32] Based on the studies published on various national systems of employee participation, it is safe to conclude that the term 'participation' does not have a single, unambiguous meaning. The actual definitions include diverse notions and disciplines concerning a non-unitary and diverse set of workers' rights originating in laws or in agreements, or in both. The notion of employee involvement (in European context nowadays often used as synonym for participation) in most countries is based on a distinction of powers and roles between the employers and the employees.[33] Through the different means of participation, workers seek to influence certain decisions made by the enterprise employing them and may also share some the economic and financial consequences of these decisions.

Another interpretation considers participation as a mean to modify or improve employment relationship and conditions, and in many cases, also the socio-economic

[32] See for example A Bronstein, En aval, des normes international du travail: le role de l'OIT dans l'elabortion et la revision de la legislation du travail, in: JC Javillier, B Geringon (eds), *Les norms internationals du travail: un patrimonies pour l'avenir: Melanges en l'honneur de Nicolas Valticos* (Geneva, 1999, ILO) 219-49; G Casale, J *Tenkorang, Public service labour relations: A comparative overview*; Paper No 17 (Geneva, 2008, ILO); G Casale, *Globalisation, Labour Law and Industrial Relation: Some Reflections*, 55 Bulletin of Comparative Labour Law; J Schregele, *Forms of participation in management* (1976) 113 International Labour Review, 117-22.

[33] R Blanpain, Representation of employees at plant and enterprise level (1994, Martinus Nijhoff).

conditions of the society.[34] Focusing on the socio-economic aspects of participation, this approach focuses on employees' influence (or potential influence) on decisions affect employment and conditions of life and work.[35] This "all-inclusive"[36] definition, including collective bargaining, does not meet with the wide consensus of scholars.[37]

The ILO defines concept of participation as "any workplace processes or mechanisms that allows employees to exert some influence over their work and the conditions under which they work."[38] A wide spectrum of practices is included in this definition from consultation of employees concerning aspects of the production process or workplace environment, to co-determination in decision-making by employee representatives, or even the full control of workers in managements, such as the model of cooperatives.[39] Thus this definition could be divided into four approaches which may co-exist in the same workplace: 1) indirect participation through employee representation; 2) direct participation, practiced face-to-face between employees and the (representative of) employers, like quality circles or autonomous work groups;[40] 3) financial participation, meaning the different schemes through which employees are able to benefit from the enterprises financial performance, like ESOP;[41] 4) employee participation on boards of management.[42]

The above definitions encompasses great many aspects of participation, however, this paper considers participation (interchangeably used with 'involvement') in a stricter meaning. I use the term participation/involvement in its meaning of direct participation and as a form of indirect representation through employee representation at enterprise level, which allows employees to influence decision-making processes at their workplace.[43]

---

[34] See, for example K F Walker, Workers' participation in management. Problems, practices and prospects (1975) 12 International Institute for Labour Studies Bulletin, 9 ff.

[35] Preamble of the ILO Resolution concerning Workers, 1966.

[36] G Arrigo and G Casale, A comparative overview of terms and notions of employee participation (Geneva, 2010, ILO) 3.

[37] The significance of the differentiation between collective bargaining and participation, as well as between direct and indirect representation will be explained later in this chapter.

[38] G Arrigo and G Casale, A comparative overview of terms and notions of employee participation (Geneva, 2010, ILO) 148. (Casale n 8)

[39] Casale (n 8) 148.

[40] On the distinction between direct and indirect representation and direct and indirect participation see especially Cs Kollonay Lehoczky (n 1) 155 ff; the issue will be discussed later in this chapter.

[41] An employee stock ownership plan (ESOP) is an employee-owner method that provides a company's workforce with a stock ownership interest in the company, usually as a part of the employees' remuneration package.

[42] See, for example, Directive 2001/86/EC supplementing the European Company Statute; in Article 2(k) participation is defined as "the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ; or the right to recommend and/or oppose the appointment of some or all the members of the company's supervisory or administrative organ."

[43] When, for historical or other reasons, the term is required to be used in a broader meaning explanation will be given separately.

B The European Dimension of Participation

The system of workers' participation in company's decision-making shows considerable differences across Europe. Neither the institutional structure nor the intensity of participation is on a somehow similar level, arising from differences of basic philosophy of industrial relations between the Member States of the European Union. The most significant differences could probably be detected between the German, the Scandinavian and the Anglo-Saxon models. In the Anglo-Saxon system institutionalised workers' participation show little compatibility with the traditional pattern of industrial relations, whereas in Germany and in the Scandinavian countries industrial relations could be characterised as cooperation-based. But even where institutionalised workers participation exists (like in France), it often remains on the level of mere information and consultation. There are other models of employee involvement as well, most notably the southern European system (with special regard to the Mondragon cooperatives), the eastern European (post-soviet) model, or even kibbutzism. Co-determination in its strict sense does not exist in majority of the Member States. However, a lower level of institutionalisation concerning workers' participation does not automatically mean lesser influence on management's decisions, as the activity of trade unions or persuading the management by informal means of could result in high level of actual control on decision making. [44]

The different culture of industrial relations is resulting from the different political, cultural and economic developments of the Member States. As Manfred Weiss points it out, in view of the heterogeneous situation it would be largely unrealistic to shape the structure of workers' participation identically throughout the EU, the most could be achieved is to approximate the systems in a functional sense.[45] However, approximation was indispensable, as the EU has no longer been a mere market and economic community but (hopefully) on its way to a political union.

The first approximation regarding workers' participation concerned specific matters, such as collective redundancies, transfer of undertaking, and safety and health issues, based on the initiations of the first Social Action Program of 1974. The Directive on collective redundancies was passed in 1975 [46] followed by the Directive on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses two years later. [47] Both Directives provide for information and consultation of workers' representatives according to the law and practice of the respective Member State. [48] Thus,

---

[44] For a survey see M Biagi, 'Forms of Employee Representation at the Workplace', in R. Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (6th ed, 1998), 341

[45] M Weiss, 'Workers' participation: A crucial topic of EU' in, R Hoffmann, O Jacobi, B Keller and M Weiss (eds), *Transnational Industrial Relations in Europe* (Hans Böckler Stiftung, 2000), 85-94.

[46] OJ (1975), L 48.

[47] OJ (1977), L 61.

[48] This also applies to the Framework Directive of 1989 on the introduction of measures to encourage improvements in the safety and health of workers; see, OJ, (1989), L 183/1.

employers are only obliged to inform and consult employees' representative in accordance with the rather vague term of "balanced participation with national law or practice."[49]

Not only that the approximation was limited to the mere right to information and consultation in these Directives, but only succeeded to a very limited extent.[50] Event though, by the amends of Directive on collective redundancies in 1992[51] and of Directive on transfer of undertakings in 1998, [52] the EU tackled the issue of transnationality, the importance of these Directives on the transnational level remained marginal compared to the effect of the establishment of an European Works Council.[53] The adoption of Council Directive 94/45/EC is considered as a major breakthrough in light of the long learning curve after the failure of the Vredling proposal.[54] The Directive introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies on the progress of the business and any significant decision at the European level that could affect their employment or working conditions. Council Directive 94/45/EC was repealed and replaced in 2009 by the Recast Directive 2009/38/EC.

The EU used the stimulus of the positive experience with the Directive on European Works Councils to revitalise the project concerning workers' participation in the boards of the European Company, which was considered to be at a fatal deadlock by the 1990s. The EWC further encouraged the EU to another far-reaching step: instead of prescribing information and consultation only for certain specific issues the national systems of information and consultation was approximated in a comprehensive way by Framework Directive 2002/14/EC on information and consultation. This Directive sets minimum principles, definitions and arrangements for information and consultation of employees at the enterprise level within each country. Leveraging on the key success factor of the EWC Directive, here again the Member States enjoy substantial flexibility in applying the Directive's key concepts (employees' representatives, employer, employees, etc) and implementing the arrangements for information and consultation.

Workers' participation constitutes a characteristic element of the European human rights instruments, from the European Social Charter through the Charter on the Fundamental Social Rights of Workers, the Charter of Fundamental Rights of the European Union. The common aim of these human rights instruments is to make the worker a 'citizen' of an enterprise. Wolfgang Hermann and Otto Jacobi call the members of European Works Councils as "ambassadors of the European civil society"[55] due to their remarkable potential to develop a strategic management structure, which represents the common interests of a multinational workforce and which formulates and represents common employment interests.

---

[49] Art 11 Para 1 of Directive on collective redundancies.

[50] A possible explanation to this partial success given by Manfred Weiss is that the actors qualified as 'employee representatives' in the different Member States are way too different; see, M Weiss, supra, 87.

[51] OJ (1992), L 245/3.

[52] OJ (1998), L 201/88.

[53] M Weiss, supra, 86.

[54] For a detailed analysis on the adoption of Council Directive 94/45/EC see, M Weiss, 'Workers' Participation in the European Union', in P Davies et al, (eds), European Community Labour Law – Principles and Perspectives (1996), 213 ff.

[55] W Hermann and O Jacobi, 'Ambassadors of the European Civil Society: Practice and Future of European Works Councils, in R Hoffmann, O Jacobi, B Keller and M Weiss (eds), *Transnational Industrial Relations in Europe* (Hans Böckler Stiftung, 2000), 95-113.

Manfred Weiss argues that if democratisation of the economy is understood to be a promoting and stabilising element for democracy in the society as a whole, and workers throughout the EU should have a similar chance to influence decisions by which they are affected.[56] Therefore, argues further Weiss, in a globalised environment the right to participate in decision making had to be extended beyond national borders, and it became necessary for the EU to address the transnational dimension of involvement. Hermann and Jacobi, while acknowledging its social importance, emphasise the economic dimension of participation, while Weiss pinpoints its societal nature and its connection to democracy. I will argue that both as an economic tool and as a human right, participation should not remain a privilege of European citizens, but have to be treated as a universal right of all workers employed by Europe-based multinational corporations.

IV Comparison of Participation with Other Forms of Representation

A Trade Union Representation and Participation

A systematic differentiation between Trade Union representation and participation was first made by Csilla Kollonay Lehoczky in her seminal paper on the topic in 1997.[57] In her definition participation is a form of indirect representation, exercised through representatives directly elected by employees, in contrast to trade union representation, which is a form of representation through an organisation separate from the employer or the community of employees. From this basic distinction other differentiating factors follow.

Trade Union representation could be traditionally described as a form of representation which is protecting employees' interest *against* those of the employers'. The main function of Trade Union is to secure the biggest possible benefit for employees from the employers' profit through different ways, mostly through the machinery of collective bargaining or other forms of wage negotiations. In contrast, participation leverage on the common denominator of employers' and employees' interest: the prosperity of the workplace. Discovering and keeping employers' competitive advantage on the market is not only in the interest of employers, but also essential for employment security, a basic need of employees.

The differences in the field of interest also determine the available instruments. The integrative nature of participation assumes that instruments facilitating cooperation between

[56] M Weiss, supra, 86.
[57] Cs Kollonay Lehoczky, The emergence of new forms of workers' participation in Central and East European countries, in: Raymond Markey, Jacques Monat (eds*) Innovation and Employee Participation Through Works Councils – International Case Studies* (Avebury, 1997) 170 ff.

parties to achieve shared goals.[58] The confrontational relationship between employers and trade unions anticipates, at least in principle, that bargaining between parties is adversarial or distributive.[59] Thus, trade unions' most frequently used legal tool is collective agreement, while participation is likely to be effectuated through information, consultation and sometimes co-determination procedures. However, a narrowing gap between the positions of the parties and the reconciliation of their interest could also be detected.[60] In the thesis I will use the notions of information, consultation and co-determination in the below specified meaning.

Access to information during decision-making is essential for employees (or their representatives). Following the definition provided by Directive 2002/14/EC[61], information is the "transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter [of the future decision] and to examine it."[62] Compared to the mere transmission of information, consultation assumes a more complex, bilateral exchange of information. Consultation is defined by Directive 2002/14/EC as "the exchange of views and establishment of dialogue between the employee representative and the employer."[63]

Co-determination creates an obligation to agree; therefore it creates a single will in the decision-making process. With other words, co-determination is more than a consensus in a subject matter between the parties. Consensus reached by the parties in individual cases, like changing the form of employment, is reached by two, albeit concordant declarations of an employee and an employer. Another important difference is that consensual decisions are only binding on the parties, whereas agreements concluded through co-determination could be binding on others as well, for example a workplace agreement concluded by works councils and employers on safety and health related matters.[64] Co-determination naturally requires information and consultation. It could appear in distinct levels, via works councils and, in some cases, as board-level participation. Co-determination presently exist in a limited scope both in terms of subject matters and in industrial relations traditions providing for such right.

Traditionally, trade unions have an autonomous organization, separate and independent from that of the employers. Employee participation, on the other hand, does not require a separate organisational structure. Moreover, having an established organisation

---

[58] This integrative nature of participation could be detected in the wording of Art. 1 (3) of Directive 2002/14: *"When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees."*

[59] Casale (n 8) 46.

[60] For a more detailed analysis see, G Casale, *Experiences of tripartite relations in Central and Eastern European Countries* (2000) 16/2 The International Journal of Comparative Labour Law and Industrial Relations.

[61] Directive 2002/14 established a framework for informing employees and consulting with them in the establishments in the European Community. It applies to all undertakings employing at least 50 employees or establishments employing at least 20 employees in the European Community, according to the choice made by the Member States.

[62] Article 2 (f) of Directive 2002/14/EC. Limitations on information will be discussed later in this paper.

[63] The conditions are further articulated by Art. 4 (4) regarding the appropriate timing, method and content of the consultation.

[64] See L Román, *A munkajog alapintézményei* [Basic Instruments of Labour Law] (Pécs, 1998, University Press of Pécs) 129-35.

would make the indirect representation form vanish altogether.[65] Representatives are executing their participatory rights in accordance with the structure of the respective employer.

The differences in the organisation structures lead to the next differentiating factor: on one hand, trade unions are forms of indirect representation: the representatives are delegated in accordance with the organisation's internal structure and regulations, trade union officers are representing the union's interest. Participation on the other hand is based on direct representation, where representatives are elected directly by the employees and they are responsible directly to their 'electors': the employees.

The origins of trade unionism go back to the 19th century and are related to the detriment of working conditions in the era of industrial revolution. Participation took an autonomous legal and organizational only in the years following the First World War in Europe. The idea is by and large associated with the principle of economic democratization in the Weimar Republic in the 1920s.[66] However, some sort of worker participation forms were established in other European countries around that time: the Whitley Councils[67] influenced the creation of works committees in the United Kingdom in 1918, laws on works councils were issued in Austria in 1919, in Czechoslovakia in 1920, and some forms of factory committees were recognized in Russia in 1917. However, the rise of the national socialist ideology set aside the participation movement until the end of the Second World War. Then, in the early post-war years the idea was revisited and widely debated in the then Federal German Republic. On an international level, workers participation became topical in the 1960s and made headway especially in America and some countries of Asia.

B Single and Dual Channel Systems

Employee participation, irrespective of its degree of evolution or stability, is a part of a complex system of collective relations within the enterprise. National models of collective representation have an apparent influence on participation methods. On one hand, in certain national systems the negotiating and participatory methods have developed in the basis of the single-channel model of union representation, as no *a priori* distinctions exists between the holders of the rights of information, consultation and the holders of the negotiating powers. Thus, the same actor can be at one and the same time representatives of workers at the

[65] Kollonay Lehoczky (n 1) 155.
[66] On economic democracy see for example F Napthali *'Wirtschaftsdemokratie. Ihr Wesen, Weg und Ziel'* (1928).
[67] Whitley Councils, also called Joint Industrial Council, were originally a series of councils made up of representatives of labour and management for the promotion of better industrial relations. The Councils were named for J H Whitley, chairman of the investigatory committee (1916–19) who recommended their formation, were first instituted as a means of remedying industrial unrest. Many of them later developed into wage negotiating bodies.

workplace holding participatory rights and be a bargaining party. In single-channel models, enterprise-level employee representation is often carried out by external trade unions.

On the other hand, in other national systems the dualism of the two concepts is apparent. In dual channel models the holders of involvement rights and the holders of bargaining powers are separate. In this model, workers' general representation in the enterprise is entrusted in a single body elected by all the workers, while unions are guaranteed autonomous forms of presence at the workplace which allow them to protect the rights of their members. Legal provisions generally govern electorate procedures, active and passive electorate and ensure that democratic principles are formally respected. A double-channel model exists for example in Germany, which can be characterized by the autonomous sphere of the co-determination, consultation and information procedures of works council, even though that these processes could lead in some cases to company level agreements.

The relationship between participation and collective bargaining is very complex, in some national contexts the exact borders are not easy to detect. A theoretical distinction assumes that participation is rooted and is operated through the concept of cooperation rising from the shared goals of employers and employees. Collective bargaining, in contrast, is assumed to be based on the conflicts of interest of the parties. Recent developments in national industrial relations however contradict to this distinction, making the material boundaries between their respective areas of autonomy uncertain.[68] Even the path followed by the European Union combines the elements of two models. The EU lawmaker does not have a preferred model, [69] certain degree of interaction emerges in Directives between collective bargaining and employee involvement right. [70]

Also, the contraposition of unions and workers' direct representation is tempered by the fact that works council representatives are often union members.[71] A number of factors play part in this development, most notably is the unions' right to develop autonomous forms of workplace representation not solely to protect their members, but to create an effective communication channel to formulate union's strategy.

Due to the different traditions of industrial relations among the Member State, there are many different forms of representative structires in the European Union. As a possible classification, the European Company Survey [72] classifies employee representation at company level as follows: single channel representation, where works councils are the sole eligible employee representation structure (examples are Austria, Germany, Luxembourg, the Netherlands); dual channel representation, wher both types of representation can be found, but

---

[68] See, for example the recent changes in the Hungarian system, whereby works councils are allowed to conclude a collective agreement-like contract with the employer, covering all aspects of the employment relationship, bar wages (Section 268 of the Hungarian Labour Code (Act No 1 of 2012)).

[69] Art 153 of TFEU (ex-art 137 of TEC) does not give the Union specific competencies regarding the right of association, the EU lawmaker can only provide for the rights of employee representatives.

[70] Under Directives 2001/86 and 2003/73 collective bargaining is intended to select and regulate the forms of and the arrangement for involvement, and in collective redundancy procedures, consultation with the workers in intended to reach an agreement (Directives 98/59 and 98/50).

[71] See the former Hungarian Labour Code, which linked union representativeness to the results of the works council elections (Section 29 Para 2 of Act No 22 of 1992).

[72] Employee representation at establishment level in Europe – European Company Survey 2009, the on-line report is available at http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2011/43/en/1/EF1143EN.pdf (last retrieved on 20 November, 2014).

works councils have a stronger role (examples are Belgium, France, Italy and Spain[73]). In some Member States, the union-based system is present together with works councils (examples are Poland, Romania, Slovakia, the UK, and to some lesser extent, Ireland); dual channel representation, with trade union shop stewards playing a prominent role (examples are Denmark, Finland, Portugal, Slovenia and Croatia); and single channel representation, where trade unions are the sole representative bodies (examples are Cyprus, Malta, Sweden, FYROM and Turkey).

C Direct and Indirect Forms of Participation

It is important to take a note on the difference between direct and indirect forms of *representation* and the direct and indirect forms of *participation*. Workers could participate in decision making either directly themselves or indirectly through their representative. Direct participation is based on a one-on-one, often face-to-face interaction between employees and their managerial counterparts, whereas indirect participation assumes that the views or concerns of the employees are communicated by a representative (or representatives) of the employees. Direct forms of participation (sometimes called 'consultative' or 'deliberative' participation) tend to be small scale and decentralized, like quality circles or autonomous work groups, integrated usually into decisions about daily work. The traditional form of indirect participation in Europe is through works councils. Works councils are, in general, legally established representations, elected or appointed by all employees in an establishment, irrespective of their membership of trade unions.

Autonomous and semi-autonomous groups are teams that determine and carry out work tasks, quality control, decide on incentive payments and discipline members who do not meet performance standards. They serve to complement or partially replace the traditional manager-subordinate structure and have the greatest degree of independence.[74] Quality circles are small groups of employees, which meet regularly on company time, aiming to improve quality and productivity within their own work areas. Management may or may not implement their suggestions, which signifies lesser degree of autonomy; however, it provides an opportunity to workers to influence the manner of manufacturing. Works councils are standing bodies providing for the information and consultation (sometimes co-determination as well) of employees at workplace level. Members are elected by all the workforce of an establishment or an undertaking.[75]

---

[73] In case of Spain, the report only asked about the presence of works councils, not trade unions.
[74] Casale (n 8) 39.
[75] Article 7 of the Additional Protocol of the Social Charter already provided for that the requirements of Article 2 of the Additional Protocol are satisfied if great majority (80per cent) of the workers is protected under its provisions, however, workers excluded in accordance with paragraph 2 of Article 2 were not taken into account in establishing the threshold for workers concerned.

D Financial Participation

Financial participation is a term applied to the various forms of employee profit-sharing and share ownership schemes which give employees a financial stake in the company for which they work. Usually a part of the profit is paid to the employees in addition to their wages. This form of participation could also be characterised by sharing the property rights with employers and it gives employees a residual right from the company's profit. Neither profit-sharing nor shared-ownership schemes are necessarily associated with employee participation in corporate governance. In theory, stock-ownership may permit influence on decisions, but in practice it is a fairly limited option.[76] Several studies confirmed that financial participation as a sole incentive has limited impact on business performance and employee involvement; but when it is combined with other policies (like professional trainings, job security or other forms of direct or indirect participation), the scheme may be positively linked with employee participation.[77] Despite of the importance of financial participation on company performance and its correlation to other forms of employee involvement, this paper excludes all forms of financial participation from its research scope.

E Board-Level Participation

Workers' representation on company boards could be understood as one step further in changing the power structure in the economic field.[78] While in most Member States of the EU board-level participation is an important component of corporate governance, company law regulations on the relationship to the company of employee representatives in the highest enterprise organs reflect the broad spectrum of different national conceptions.[79]

Employee participation is referred to in Council Directive 2001/86/EC (supplementing the European Company Statute) concerning the involvement of employees. Article 2(k) defines participation in particular terms as 'the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ; or the right to recommend and/or oppose the appointment of some or all the members

[76] Among other reasons, it is due to the agency problems between shareholders and management.
[77] See for example, M Festing, Y Groening, R Kabst and W Weber, *Financial participation and performance in Europe*, 15 Human Resource Management Journal, 54–67; P Kalmi, A Pendleton, and E Poutsma, (2005) *The Relationship between Financial Participation and Other Forms of Employee Participation: New Survey Evidence from Europe* (2006) 27 Economic and Industrial Democracy, 637-667; A Pendleton, E Poutsma, C Brewster and J van Ommeren, *Employee share ownership and profit-sharing in the European Union: incidence, company characteristics, and union representation* (2002) 8 European Review of Labour and Research 47-62.
[78] M Weiss '*The effectiveness of labour law: reflections based on the German experience'* (2006) 48 Managerial Law, 3, 283.
[79] N Kluge and P Wilke 'Board-level participation and workers' financial participation in Europe - State of the art and development trends' (2007) European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS).

of the company's supervisory or administrative organ'. Council Directive 2003/72/EC (supplementing the Statute for a European Cooperative Society) repeats this definition of participation. The current dissertation does not deal with the forms of board-level participation

Chapter 2
Hypotheses and Research Questions

During my research I established the following hypotheses:

H1 EMPLOYEE INVOLVEMENT HAS A DUAL NATURE: IT HAS TO BE REGARDED BOTH AS AN ECONOMIC QUESTION AND AS A HUMAN RIGHT.

H2 DUE TO ITS HUMAN RIGHTS CHARACTER, EMPLOYEE INVOLVEMENT CANNOT BE REGARDED AS A PRIVILEGE OF EUROPEAN CITIZENS, BUT HAVE TO BE TREATED AS A UNIVERSAL RIGHT OF EVERY WORKER AND HAS TO BE SAFEGUARDED WITH SUFFICIENT LEGAL PROVISIONS.

H3 PARTICIPATION IS SUBJECT TO SIMULTANEOUS RECOGNITION OF INDIVIDUAL FREEDOM AND THE FORCE OF SOCIAL INFLUENCES ON THE EXTENT AND REACH OF INDIVIDUAL FREEDOM.

Theories arguing that political democracy and economic development could be treated separately have been overcome, mostly by the advocates of a new theoretical paradigm, known as 'human development' or 'capability approach'.[80] These 'counter-theories' argue that urgent human problems and unjustifiable human inequalities have to be addressed in a different way, no matter how much the dominant theories have been rooted historically in policy choices. Increased GDP has not necessarily influences people's lives, and has little to do with combating inequality and deprivation. The new approach shall encompass human dignity as its central element.

While the importance of market mechanisms in development should not be denied, but other aspects, such as social and economic equity or political liberties, need to be equally considered and assessed. As Amartya Sen phrases it, "[e]conomic unfreedom can breed social unfreedom, just as social or political unfreedom can also foster economic unfreedom."[81] Sen also challenges the dichotomy, prosperous in East Asian countries,[82] that denies the relevance of political freedom when the urge to meet economic needs requires it. Sen, challenging the "Lee Thesis",[83] asks the question of what should be more urgent for policy makers: to

[80] M C Nussbaum, 'Creating Capabilities' (Cambridge, 2011, Harvard University Press), x.
[81] A Sen, Development as Freedom (Oxford, 1999, OUP), 8.
[82] Sen particularly refers to China and Singapore.
[83] Sen argues against the 'Lee Thesis', named for President Lee Kuan Yew of Singapore, which states that denying political and civil rights is acceptable if it promotes economic development and the general wealth of the population (Sen, 1999:15). He rightly insists that we should approach political freedoms and civil rights not through the means of eventually achieving them (GDP growth) but as a direct good in their own right. Freedom is also good because it creates growth. See, O'Hearn 'Amartya Sen's Development as Freedom: Ten Years Later', Policy & Practice: A Development Education Review, Vol. 8, Spring, pp. 9-15.

eradicate poverty, or to guarantee democratic rights (for which poor people have little use anyway)? Sen's answer to this question is very straightforward: economic development and liberty are interconnected. Separating them or prioritizing one over the other is entirely the wrong approach. Without freedom, including the opportunity to participate in decision-making on matters affecting the main areas of an individual's life there is no economic freedom.

Hugo Sinzheimer compared economic democracy to political democracy and noted that they are similar in the sense that they both guarantee freedom to individuals *vis-á-vis* power (capital), and they both enable individuals to participate in the creation of a common will.[84] In Sinzheimer's views, economic democracy has two complementary pillars: the self-regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy.[85]

It follows from the above that

H1 EMPLOYEE INVOLVEMENT HAS A DUAL NATURE: IT HAS TO BE REGARDED BOTH AS AN ECONOMIC QUESTION AND AS A HUMAN RIGHT.

The research questions concerning HYPOTHESIS 1 was, (Q1) *What are the most influential economic theories concerning employee involvement?* (Q2) *Whether employee involvement has helped to mitigate the negative impact of economic crises* and (Q3) *How employee involvement is addressed in human rights instruments??*

On one hand, the positive effect of employee involvement has been heavily contested.[86] Indeed, the methods of how decisions are made naturally affect the dynamics of the enterprises. The more participants are involved in decision-making, the longer it takes to reach a conclusion, therefore the more expensive the process becomes.[87] The promoters of the efficiency theories argue that since producing outputs at the lowest cost is in the utmost interest of the residual claimants of the company as it increases net cash flows, employees' interest in involvement is contrary to that of the residual claimants. On the other hand, there are many economic theories[88] which argue for the positive correlation between productivity

[84] Hugo Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (1976).
[85] Hugo Sinzheimer, *Eine Theorie des Sozialen Rechts (1936)* XIV Zeitschrift für öffentliches Recht.
[86] See for example, Michael C. Jensen and William H Meckling, '*Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure'*, Journal of Financial Economics, October, 1976; E. F. Fama and M. C. Jensen, *Separation of Ownership and Control*, Journal of Law and Economics, Vol. 26. No. 2, 1983; R. B. Freeman and E. P. Lazear, *An Economic Analysis of Works Councils, in Works Councils: Consultation, Representation, and Cooperation in Industrial Relation.*
[86] A. A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J Poll. Econ. 211, 1950
[87] R. B. Freeman and E. P. Lazear, *An Economic Analysis of Works Councils, in Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*.
[88] For theoretical background see, Black, S. E. and Lynch, L. M. (2004), What's driving the new economy?:The benefits of workplace innovation. The Economic Journal, 114: F97–F116; and for recent case studies, among other, J. M. Gallego, L. H. Gutierrez, S. H. Lee, A firm-level analysis of ICT adoption in an emerging economy: evidence from the Colombian manufacturing industries, Industrial and Corporate Change, 2014; Mohamed Kossaï, Patrick Piget, Adoption of information and communication technology and firm profitability: Empirical

and employee involvement. Path dependence theories, property and human capital theorems and findings of behavioural economics will be presented to challenge the efficiency theory.

While the theoretical discussion has been going on for many decades, the economic crises have provided solid reference points for researchers to study the interrelatedness of firms' performance and the different forms of social dialogue from 2007 onwards. Though the negative consequences of an economic turmoil typically reach the labour market with delay, this time the effects were almost immediately visible,[89] forcing social partners to act quickly. Despite the fact that the crisis was described as an 'omnipresent phantom in the autonomous European inter-professional social dialogue', [90] the various forms of social dialogue at national, sectoral and company level have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis.[91]

Regarding the human rights character of employee involvement, my starting point was the theory of Hugo Sinzheimer on the interrelation of political, economic and social aspect of democracy, also justified by the findings of Amartya Sen. Further to the principle of democracy, it is argued by Csilla Kollonay Lehoczky that "being involved in decisions made on matters affecting the main areas of the life of a person is a fundamental human right. It guarantees a person to not be treated as a subject, a serf, instead, a '*citoyen'* – a citizen in the full moral and political meaning of the word."[92] Even though some of the human rights instruments explicitly promote employee involvement as a fundamental right, [93] its acknowledgment is much dependent on political regimes. Currently only European human rights instruments recognised employee involvement as a human right, the European Social Charter and the Charter of Fundamental Rights of the European Union. However, efforts to expand its scope of application were made by the ILO and the OECD.

Even though employee involvement certainly has an economic impact on firms (whether it is positive or negative), as Sen argues, political liberty and civil freedoms are directly important on their own and no further justification is needed for their existence in

---

evidence from Tunisian SMEs, The Journal of High Technology Management Research, 2014, 25, 1, 9; Masaki Matsunaga, Development and Validation of an Employee Voice Strategy Scale Through Four Studies in Japan, Human Resource Management, 2014, 53, 5.

[89] The unemployment rate went up from 7.4 per cent (2007) to 7.7 per cent in October 2008 (See, European Commission, Economic forecast, Spring 2008, 1 European Economy.

[90] S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), 75.

[91] C E Triomphe, R Guyet and D Tarren, 'Social Dialogue in Times of Global Economic Crises' (Eurofund, 2010), V Glasner and B Galgóczy, 'Plant-level responses to the economic crisis in Europe (ETUI-REHS, 2009), I Guardiancich (ed) 'Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia' (ILO (EC), 2010); B Segol, M Jepsen and P Pechet (eds) Benchmarking Working Europe 2014 (ETUI-ETUC, 2014,).

[92] Cs Kollonay Lehoczky 'The fundamental Right of Workers to Information and Consultation under the European Social Charter' in Dorssemont and Blanke (eds) 'The Recast of the European Works Council Directive (Intersentia, 2010) 3-4; emphasis in origin.

[93] European Social Charter (Arts 21 and 22), Charter of Fundamental Rights of the European Union (Art 27). While the literature is evidently more addressing Article 28, this might be considered evident in the light of the "contemporary" Laval and Viking decisions, however, the importance of the Article 27 rights is not-questioned. For a more detailed analysis see Silvana Sciarra 'Viking and Laval: Collective Labour Rights and Market Freedom in the Enlarged EU (2007-08) 10 Cambridge Yearbook of European Legal Studies, 563 ff and E Ales 'Information and Consultation within the Undertaking' in T Blanke, E Rose, H Voogsgeerd and W Zondag (eds) Recasting Worker Involvement? Recent trends in information, consultation and co-determination of worker representatives in a Europeanized Area (Groningen, 2009, Kluwer).

terms of their positive effects on the economy.[94] In his view, even a tyrannical form of work can itself constitute a form of deprivation. In this sense, human capability is the substantive freedom of people to lead lives which they have reason to value and to enhance the real choices they have. Thus, the basic human value that people ought to have influence on decisions made about issues that affect important areas of their lives should prevail.

HYPOTHESIS 2 follows from that argument:

H2 DUE TO ITS HUMAN RIGHTS CHARACTER, EMPLOYEE INVOLVEMENT CANNOT BE REGARDED AS A PRIVILEGE OF EUROPEAN CITIZENS, BUT HAVE TO BE TREATED AS A UNIVERSAL RIGHT OF EVERY WORKER AND HAS TO BE SAFEGUARDED WITH SUFFICIENT LEGAL PROVISIONS.

Kollonay further argues that the protection of human dignity and social democracy requires the extension of human rights to 'private relationships', such as employment, and the states have positive obligations to safeguard it. After reviewing the provisions of the relevant human rights instruments and the framework of the transnational model of employee involvement of the European Union, the following research question was formulated: (Q4) *If employee involvement is a fundamental human right, thus, in that sense, has a universal value, what measures have been taken to promote it outside of the European terrain?*

I reviewed the instruments of ILO and OECD and looked into measures of non-state actors as well. The answer to this question was that absent fiat, employers tend not to propagate employee involvement within their organization. Recommendations, guidelines and other non-compulsory instruments could play an important role, especially at multinational enterprises, as compliance with human rights principles have increasingly been measured and evaluated by the market.

The European Union addressed employee involvement in general in three major directives,[95] the European framework directive on information and consultation (2002/14/EC), the (recast) directive on European works councils (2009/38/EC) and the directive on employee involvement in the European Company (2001/86/EC).[96] However, the limited personal scope of legal instruments (European Social Charter, CFREU, various EU Directives) concerning employee involvement overlooks the fact that transnational companies often operate subsidiaries outside of the Member States/Contracting States. The activity of these undertakings significantly contributes to the overall performance of the group, and the different (generally lower) standards of the non-EU countries constitute a competitive edge for most European multinationals. The next research question followed from these findings

[94] A Sen, Development as Freedom (Oxford), 3, 16.

[95] Besides this general frame, a range of directives secure the right of information and consultation of workers in specific situations, such as in case of collective redundancies (98/59/EC), transfer of undertaking (2001/23/EC). The directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EC) also contains important regulations on participation. In total, more than 15 directives deal with information and consultation in some kind of a general or specific sense and thus form part of the social *acquis* in this regard.

[96] Directive 2001/86/EC however will not be examined in the current dissertation.

was, (Q5) *What role the European Union could have in better safeguarding employee involvement as a fundamental human right?*

One of the biggest challenges to controlling the activities of European corporations operating outside of the territory of the EU is the territorial sovereignty of States. The exercise of extraterritorial jurisdiction faces both legal and political obstacles. A general rule of international law affirms that one state cannot take measures on the territory of another state by means of the enforcement of national laws without the consent of the latter. However, within a limited scope, specific principles can offer a legitimate basis for exercising jurisdiction. The doctrine to be applied to justify extraterritorial jurisdiction depends on the nature of the regulatory area.

I took the liberty to examine whether the extension of the personal scope of the relevant EU Directives (2002/14/EC and 2009/38/EC) could theoretically offer a solution to the above problem. I quoted an example from the area of environmental protection, where the EU has made a step towards extraterritorial jurisdiction – supported by the judgment of the Court of Justice of the European Union – to protect a fundamental right (which has nevertheless significant economic impact as well).

The first normative conclusion of the dissertation is that the expansion of the personal scope of the Directives 2002/14/EC and 2009/38/EC could effectively contribute to the promotion of employee involvement as a fundamental right at subsidiaries of Europe-based multinational companies which are located outside of the European Union. The directive on European Works Council has set up an outstanding institutional model for information exchange and consultation on transnational matters of multinational enterprises. Since framework directive 2002/14/EC acts a 'transmitting agent' for information and consultation, it would be necessary to expand its scope too.

In terms of personal scope, three points was considered to investigate further the possibility of extension. One was the definitions provided by Directive 2009/38/EC. For the purposes of the Directive, a 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation, or the rules which govern it. The ability to exercise a dominant influence is presumed when an undertaking, in relation to another undertaking directly or indirectly: (a) holds a majority of that undertaking's subscribed capital; (b) controls a majority of the votes attached to that undertaking's issued share capital; or (c) can appoint more than half of the members of that undertaking's administrative, management, or supervisory body. These conditions are also supposed to be met in the relation of subsidiaries which are located outside of the European Union.

Two was the notion of transnational character. According to the Directive, matters with transnational character are those which concern the entire undertaking or group, or at least two Member States. These include matters which are of importance to the *European* workforce in terms of the scope of their potential effects or which involve transfers of activities within the *Member States*

Three was the scope of Directive 2009/38/EC. The EWC Directive is not only applicable to undertakings or groups of undertakings which are located within the territory of the EU, but also addresses non-European businesses by stating that the mechanisms for informing and consulting employees in undertakings (or groups of undertakings) operating in

two or more member states shall encompass all establishments, regardless of whether its central management is located inside or outside of the territory of the Member States. The aim of this extension is the protection of the European workforce, and it does not constitute extraterritorial legislation as it refers to business activities which take place within the EU. If employee involvement has a fundamental value, it should not be treated as a privilege of European workers and its promotion is a positive obligation of the European Union.

To ensure that the right of information and consultation is effectively realized at subsidiaries of the Europe-based multinational companies which are located outside of the territory of the EU, the personal scope of Directives 2002/14/EC and 2009/38/EC should be expanded in a way that encompass all branches which are under the control of the controlling undertaking domiciled in the EU. The notion of a controlling undertaking could create a link to subsidiaries located outside of the EU territory. Regarding trans-nationality, as argued above, in reality the impact of these 'third country subsidiaries' is of great significance for the multinationals. Therefore issues related to their activity, or which involve transfers of activities between the operations, have an increased importance for the entirety of the workforce in terms of the scope of their potential effects. All branches then should be included in the concept of the transnational character.

It may be argued that the enlarged personal scope would constitute a competitive disadvantage to European multinational companies and therefore would encourage businesses to move their seats outside of the Member States. However, the empirical evidence quoted above proves that it would, on the contrary, ensure even higher level of competitiveness for European undertakings. It has to be also noted that both the framework directive and the EWC directive have problematic areas. The change in the regulatory technique allowing more room for Member States for transposition with regard to the different traditions in industrial relations catered better for employee involvement and constituted a key success factor of the (original) EWC Directive. However, researches showed that such flexibility regarding the actual implementation of the respected Directives resulted in great inequalities in national laws for the detriment of workers. Regarding the definitions, firstly the notion of confidential information has to be better addressed. Specification on the quality and quantity of the data provided for employees' representatives would be necessary. Further to that point, the limitations regarding the disclosure of the information which has been provided to the employee representatives and liability for the violation of the provision has to be centrally regulated. The level of protection what employee representatives enjoy ought to be also unified. Furthermore, the position of employee representatives needs to be consolidated. The enforcement mechanism in employee involvement signifies a difficult socio-legal problem. However, regulations concerning the set-up of the representation system are *lex imperfecta,* meaning that there are no sanctions imposed if the employees do not initiate the activity.[97] Positive actions on the employees' side could hardly be triggered by legislative measures, the incentive itself is to be informed and consulted. Strengthening the position of the employee representatives could initiate more interest among workers in participation. Adequate training opportunities providing better understanding on business management may also encourage employees to take a more active role in the information and consultation processes. Lastly,

[97] Or, if we consider the fact not being informed and consulted as a sanction itself, *lex minus quam perfecta.*

sanctions imposed on employers for not complying with the information and consultation provisions have to be unified as well for better predictability for both employers and employees.

Due to the recent re-codification of Labour Law in Hungary, it seemed important to examine the changes concerning employee involvement in Hungary. While Act No I of 2012 maintains the democratic principles of its predecessor concerning works councils, it has brought significant changes to the regulation of industrial relations. Since the changes substantially affected the stance of works councils, the research question articulated regarding this matter was (Q6) *Whether the provisions of the new Hungarian Labour comply with the European norms, such as the European Social Charter and Directives 2002/14/EC and 2009/38/EC?*

The new Labour Code successfully cleared away most of the confusion originated in the horizontal dual channel model of Act No XXII of 1992; however, my findings concerning the rights of works councils are rather negative. First, a fundamental misconception of works council is indicated by the statement that the function of works council is to monitor the compliance of employers' practices with the employment regulations. The existing rights of works council are not sufficient to provide effective control over employers. The sanctions related to the unlawful practices of employers, eg, the violation of information, consultation and co-determination rights are not dissuasive enough to prevent the malpractice of employers. As Professor Kollonay argues, sanctions and remedies are indispensable instruments and "a *sine qua non* of the information and consultation rights as genuine and enforceable human rights."[98] I found that the protection of employee representative is not sufficient. Whereas it is uncontested that 'regular' members of works council deemed employee representative (for example the regulations concerning confidential information are binding on them), only the chairperson is protected against unfair dismissal. This practice obviously goes against the requirements set forth by Directive 2002/14/EC and violates Article 22 of the European Social Charter as well as the provisions of ILO Convention No 135. Third, even though the scope of consultation was enlarged compare to that of the previous Labour Code, the right of co-determination was curtailed. The available remedies are not as effective as they were before. However, without dissuasive sanctions and proper remedies, the right to conclude a workplace agreement covering subject matters of a collective agreement is not a sign of empowerment of works councils, but a rubber stamp on the workplace rules unilaterally drawn up by employers. However it might occur as an overwhelmingly strong statement in a doctoral dissertation, the new Labour Code – in line with other legislative measures concerning social dialogue[99] – had a significant share in the process which has gradually turned collective labour law into vaudeville in Hungary.

Finally, while it is unquestioned that participation largely depends on the industrial traditions of a state, I was also interested how social patterns influence employee involvement. I

[98]Kollonay, Fundamental…, 30.

[99] Most notably Act XCIII of 2011 on the National Economic and Social Council (*Nemzeti Gazdasági és Társadalmi Tanács*), which abolished tripartite social dialogue in Hungary, or, as a matter of fact, social dialogue *per se*. Another example could be the Permanent Consultation Forum (*Versenyszféra és a Kormány Állandó Konzultációs Fóruma*), which was not even established by a legal instrument.

examined two models of employee involvement in particular, the Japanese system and the Hungarian state-socialist model. Analysing how employee involvement is embodied to a given political and social environment, and established HYPOTHESIS 3:

H3 PARTICIPATION IS SUBJECT TO SIMULTANEOUS RECOGNITION OF INDIVIDUAL FREEDOM AND THE FORCE OF SOCIAL INFLUENCES ON THE EXTENT AND REACH OF INDIVIDUAL FREEDOM.

The first question I looked into here was: (Q7) was *how the traditional decision making patterns influence employee Involvement in Japan?* Japan or more precisely, the 'Japanese economic miracle' has gained much attention all over the world. Indeed, the Japanese GDP got doubled and then tripled in the 1960s compare to the years following WWII, and the Japanese employment model significantly contributed to this success. [100] Here I just would like to point out two major aspects. One is that after the Second World War democratization was forced on Japan by the Allied Powers and this process has had an ambiguous success. [101] Second, to some extent following from the first point, Japan does not have a long-standing democratic culture. Feudal patterns could be detected in many layers of the society, especially in decision-making process. Even though legislative movement have been supportive towards participation, the traditional master-servant type of subordination tradition seems to overwrite the institutionalised system of participation. The limitations imposed on individual freedom to promote social commitment seem to make participation meaningless at workplaces.

The second model I looked into was the state-socialist model through the example of Hungary. I refer to state-socialism as the economic model adopted in Hungary and in other Eastern European states during the communist era. The ideology was based on the state ownership of the means of production and centralized planning, along with a bureaucratic management of workplaces, and the ideological subordination to the all-encompassing communist party. As oppose to its original theoretical roots promoting the control of workers over the management and control of production, the party controlled the national economy and planned the production and distribution of capital goods. State-socialism promoted workers' participation and the official rhetoric referred to it as a distinguishing element of 'socialist democracy', which was superior to capitalist systems. [102] Participation was also recalled as a tool to improve economic performance. These elements reappeared throughout the legislative movements. While it is presupposed that centralized, autocratic systems are counter-interested in promoting democratic decision making processes, I examined the role of grass-root participatory instruments in political democratization processes first after the end of the second World Was and then in the course of the revolution in 1956. The second research

[100] G Bai 'Japan's Economic Dilemma: The Institutional Origins of Prosperity and Stagnation' (New York & Cambridge, 2001, Cambridge University Press).
[101] See for example, M Schalber, *'The American Occupation of Japan: The Origins of the Cold War in Asia'* (OUP, 1985); M E. Caprio and Y Sugita, *'Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society'* (Taylor and Francis, 2007); CJ Coyne, *'After War: The Political Economy of Exporting Democracy'* (Stanford University Press, 2008).
[102] Erzsébet Strassenreiter: The social democratic party in the political life of the country (1944 – 1948) In: Múltunk 1990/3 (114-128)

question under this hypothesis was (Q8) *whether participation could function in a genuine manner in an autocratic regime?* My brief answer to this latter question is negative. There are extensive interconnections between political freedoms and participation, as a possible realization of economic needs. The significance of economic needs underscores the urgency of political freedoms, rather than deducts it.[103]

Autocratic regimes deny the reason of existence of human rights and individual freedom, as centralised systems could not afford the control which enforceable rights would impose on them. However, the example of state-socialist Hungary (similarly to the Japanese model) demonstrates that there is no substitute for individual freedom – and individual responsibility either. As Sen argues, any affirmation of social responsibility that replaces individual responsibility is counterproductive. Therefore, the state-socialist model (regardless of the way how power was exercised by the Communist party and its successors) could never achieve the intended function of worker participation.

The final conclusion of the dissertation is that it is not possible to have genuine participation in regimes which deny the existence or even question the importance of individual freedom. The right to information and consultation is an individual right, in a sense that it should be enjoyed unconditionally by every employee, and which is exercised by the representative body of employees.[104] Thus, it is not enough if a system is devoted to group- or collective-oriented rights, what matters is the simultaneous recognition of individual freedom and to the force of social influences on the extent and reach of individual freedom.[105] The European model of participation is successful not only because it encompasses employee involvement as a human right and a tool for economic efficiency, but also because participation has a solid foundation based on principles of democracy.

Only democracy can create an environment that fosters the substantive freedom of people to lead lives which they have reason to value, that enhances the real choices they have, and that thereby promotes social justice. Observations Sinzheimer and Sen made on the importance of democracy have to be remembered here. Protection of the human dignity of employees has essential importance to society, as the working power of man is not only an individual but also a social asset. The right to employee involvement has to remain protected and be promoted not only as tool to enhance economic competitiveness but also as a fundamental right. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of the humanity of workers through involvement ought to be seen as a shared responsibility of global economic actors.

---

[103] A Sen, Development as Freedom (Oxford, 1998), 148.

[104] E Ales 'Information and Consultation within the undertaking' *in Recasting Worker Involvement? Recent trends in information, consultation and co-determination or worker representatives in a Europeanized Arena*' (Kluwer, 2009) 13. Similarly, Otto Kahn-Freund argued that the right to strike is an individual right; see, O Kahn-Freund '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe), 5 ff.

[105] A Sen, 'Development as Freedom (1998), xii. 283-89.

Chapter 3
Methodology

Defining the notion of participation or employee involvement required the research of tertiary sources, especially dictionaries and encyclopaedias relevant to the topic. The sources of the ILO and Eurofound[106] were found to be indispensable in the quest for commonly acceptable definitions.

After the initial research based on tertiary sources, it was apparent that the topic of employee involvement or participation has been well researched both as an economic and as a legal question. The recent economic crisis also put participation in researchers' spotlight as a possible tool to mitigate the negative impacts of the economic turmoil. The dissertation aims, however, to provide a more profound analysis of employee participation than a mere summary of previous scientific achievements. The purpose of the dissertation is to provide an in-depth analysis of participation based on the direct evidences and observations of scientific researches or observations. The research sets to go beyond the legal instruments and tried to contemplate the relevant socio-economic phenomena as well.

Especially the firth part concerning the sate socialist model of employee involvement relies heavily on the historical records of the Trade Union Archives of Hungary (*Szakszervezeti Levéltár*) as well as the Institute of Political History (*Politikatörténeti Intézet*).

However, probably the most important primary sources of the dissertation are the national and international legal instruments concerning employee involvement. The dissertation presents three participation models in the European Union, in contemporary Hungary, in Japan and in the state socialist era of Hungary. To understand the differences and similarities between these models, it was evident to analyse their legal foundations. With regard to the transnational dimension of employee involvement, the law of the European Union was examined. This analysis contained mostly primary and secondary sources of law, however, supplementary sources of European Union law, such as the case law by the Court of Justice of the European Union, international law and general principles of European Union law were also taken into consideration.

Regarding the *de lege ferrenda* concept of the dissertation, principles of public international law were examined, with a special emphasis on those of concerning extraterritorial legislation. In this context, the case law of the Court of Justice of the European Union was also analysed. To understand the transnational dimension of participation outside of the borders of the European Union, legal instruments of non-state actors, such as the

[106] See, Arrigo and Casale (eds) *A comparative overview of terms and notions on employee participation*, ILO Working Paper No 8, (Geneva, 2010) and the European industrial relations dictionary of Eurofound at http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/, also, Max Planck Encyclopedia of Public International Law.

regulations of the OECD were analysed. To less extent, company regulations and good practices were also included in the primary sources.

The European, Japanese and Hungarian case law on employee involvement also formed an important part of the primary resources. The critical analysis of the court decisions has helped to capture the different and sometimes contradictory interpretations of the legal regulations.

The dissertation aims to present employee involvement in an interdisciplinary manner. Studies which analyse, interpret and criticize primary sources had utmost importance in relation to the synthesis of the different researches, eg, analysis from legal, economic, organizational theory, cultural or philosophical fields.

Also, secondary sources were used to analyse employee involvement in its historical context. Concerning the evolvement of collective labour law in Hungary after World War II, very rich literature could be found concerning the history of trade unions. However, only a few secondary sources deal with participation. In the Hungarian context, therefore, primary sources had special significance. In contrast, due to language barriers and lack of access to primary sources, secondary sources were used for the assessment of the historical background of the Japanese model.

Employee involvement takes into account each country's cultural, historical, economic and political context. The complexity of the notion is also apparent in the great many definitions used in the different scientific fields.

Due to its fundamentally different roots, there is no 'one size fits all' model of participation that can be readily exported from one country to another. Adapting employee involvement to the national situation is a key to ensuring successful implementation of its principles due to the diversity in institutional arrangements, legal frameworks and traditions of participation. Therefore, a comparative analysis of the legal instruments was indispensable, even though, it is not the primary goal of the dissertation to compare the different models with each other.

PART II
THE DUAL NATURE OF EMPLOYEE INVOLVEMENT

Chapter 1
Weimar Origins

I Precursors of Works Councils in Germany

The institutionalized system of works constitution and the form of employee representation through works council are generally connected to the labour movements of the Weimar Republic. However, some rudimentary forms of such representation could be found in earlier stage of history. At the beginning of the 19th century, to keep trade unions out of the plants and to provide more legitimacy to employers' policies, employers voluntarily established some forms of employee participation.[107] The majority of these shop committees were unsuccessful due to the limited power provided to them and the strict limitations of their functions to unimportant issues. However, in 1898 during a big strike in the mining industry, strikers sent a delegation to Keiser Wilhelm II to seek his help with settling the industrial incident and to ask his support regarding the establishment of shop committees. The Emperor declared himself in favour of the shop committees and signed the so called 'Berlin Protocol', which granted the right to miners to set up shop committees.[108]

Further to this agreement an industrial regulation order was promulgated in 1891, allowing workers to set up shop committees (Arbeiterausschüsse, Arbeiterräte) in every

[107] From 1889 to 1891 there were major strike movements in Germany, which was connected to the birth of the large trade unions.

[108] In the Reichstag Emperor Wilhelm II also delivered a speech on February 4, 1890 stating that 'In order to protect the interest of the workers and to establish permanent peace in industry, there must needs be created a legal body in which the representatives of the employers and the workers should get together to regulate their common affairs' - quoted by B Stern, Works Council Movements in Germany' (Bureau of Labor Statistics, US, No 383, 1925), 16.

establishment employing more than 20 workers.[109] In 1905 a new resolution provided for the compulsory establishment of shop committees in mines employing 100 or more workers. The workers' representatives were given the right to participate on equal terms with the employers in the management of the mutual aid funds, to take up and discuss with employers all the complaints and demands of the workers, and to supervise the weighing of the coal and the wage accounts of the workers. Later, due to the political changes the perception of trade unions towards employee participation was changed, and they supported shop committees as a democratic form of plant management which could control the employers' decision-making power. Also, the shop committees were under the control of trade unions. However, in 1920 during the enactment of the first Act on Works Councils, a compromise had to be found with the conservative majority of the Parliament. Thus, the model as it appears in the Act resembles more to the original, 19th century form of employee participation than the later concept developed by trade unions. The dualistic model of trade union representation and works council representation independent from trade unions was established.[110]

It is a striking question, what was the original motivation for establishing the legal framework concerning participation? Whether it was the idea of democratisation of workplaces, or, a more mundane reason, to keep trade unions away from workplaces? Answering this question, Ernst Fraenkel[111] argues that until the point in time when the movement was stronger politically than economically, it was likely to rely on its industrial might to gain recognition from employers; and when it was pacified, eg, became industrially weak, yet was represented in Parliament, the emphasis was put on legal instruments to promote their interests.[112]

II Constitutional Framework

The Works Council Act (*Betriebsratgesetz*) of February 4, 1920 was a part of the framework established by the Weimar Constitution far ahead of its age.[113] Article 165 of the Weimar Constitution provided for that workers and employees in order to look after their economic and social interests ought to cooperate with employers on an equal footing regarding the regulation of salaries, working conditions, as well as in the entire field of the economic

[109] The original draft called for the compulsory establishment of shop committees; however, due to the fierce opposition of the Social Democrats, the compulsory phrase was eliminated from the final text. Despite of the voluntary nature of the regulation, the shop committee movement was accelerated, and in 1906 about 1000 shop committees were reported, covering 10per cent of the eligible establishments – quoted by B Stern, supra, 18.

[110] M Weiss and M Schmidt, Labour Law and Industrial Relations in Germany (Kluwer Law International, 4th Edition, 2008), 222.

[111] Ernst Fraenkel was a political scientist, who was a member of the social democrats and one of the few jurists who held socialist opinions during the Weimar Republic. Fraenkel worked closley with Hugo Sinzheimer during this period.

[112] E Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' in T Ramm (ed) *Arbeitsrecht und Politik: Quellentexte 1918-1933* (Neuwied am Rhein 1966), 266.

[113] Adopted on August 11, 1919. The Act was abolished and replaced by the Act on the Order of National Labour on the 20th of January, 1934 that based the works constitution on the basis of the "Führerprinzip".

development of the forces of production. The scheme provided for a parliamentary form of governance, similar to and parallel with that of the political state. The lowest unit, the Enterprise Workers Council, was representing the interest of employees at workplace level. The next unit in the industrial field was the economic district, represented by the District Works Council. The District Workers Councils were to be made up of an equal number of representatives of capital and labour. Finally, the highest unit was to be the nation itself, governed by the Reich Economic Council, also to be composed by the elected representatives of labour and capital in the same way as it was to be at the District Workers Council.[114] The detailed regulations of Factory Workers Councils were promulgated in the Act on Works Council, but District Workers Councils and the Reich Economic Council had never been set up.

According to the Constitution, District Workers Councils and the Reich Economic Council would have met with the representatives of employers and other interested population groups for the purpose of performing economic functions and for cooperation in the execution of the laws of socialization, foreseen by Article 156 of the Weimar Constitution. Further to the plans, the competent Ministry, before proposing important drafts of social- or economic-related bills, would have had to submit the plans to the Reich Economic Council for consideration. The Reich Economic Council would have itself had the right to initiate drafts of such bills too. If the Reich Ministry had failed to assent, it would have had nevertheless the right to present the draft to the Reichstag accompanied by an expression of its views. [115]

III Works Council Act

The Act on Works Council constituted the most extensive and most important piece of social legislation of the era. It touched upon almost every phase of labour and social legislation, such as the Code of Industrial Regulations, the law concerning collective agreements, labour exchanges, mediation and arbitration. Even though the final text of the law was compromised, its significance is unquestioned.[116]

The Act on Works Council set forth that *"[in] order to safeguard the collective economic interest of the employees (...) as against those of the employer, and to assist the latter in fulfilling the <economic aims> of the establishment, works councils are to be organized in all establishment having under normal conditions not less than 20 employees*."

---

[114] Article 165 of the Constitution of the Republic of Weimar; available online at http://en.wikisource.org/wiki/Weimar_constitution (last retrieved on November 16, 2014).

[115] For a detailed description on the envisaged role see, Weltner (1961) 573ff.

[116] The first draft of the Act was heavily contested by both employers and trade unions. The proposal was turned over to a special committee to balance the needs of various political parties For example the works council co-determination right on hiring was eliminated, but on dismissal it was retained The weakening of the power of works council was met with an outburst of opposition, delegations were continuously sent to the special committee to renegotiate the provisions, and during the second reading of the law, over 100,000 workers demonstrated at the Reichstag - the demonstration was ended by the police, shooting into the crowd, leaving 42 persons killed and 105 wounded; B Stern, supra, 27.

In the light of the provisions of the Weimar Constitution, the dual nature of employee involvement appears in a sprouting form in the Works Council Act. First, the concept of 'collective economic interest' of the employees and the envisaged parliamentary form of interest representation through the District Workers Council and the Reich Economic Council projects the Sinzheimerian ideal of economic democracy. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties.[117] In Sinzheimer's views, the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations, which is essential to safeguard their human dignity. Second, the furthering of the 'economic aims' of the establishment appears as a common goal of both labour and capital, for which they ought to strive in a cooperative manner. However, such cooperation was only possible if the economic aims of the establishment were not identified with the profit-maximizing tendency of the employer/owner, but rather with efficiency and the highest possible productivity, aiming for an economic operation.[118]

A Rights and Duties of Works Councils

According to the law, works councils had to make up of three representatives in establishments with 20 to 49 employees; and the number of the representative was growing proportionately with the size of the establishment, the highest number of representatives was maximized in 30. The wageworkers' council and the salaried employees' council were to be made up of the corresponding group members in the works council.[119]

i General Provisions

Section 66 of the Works Council Act specified the duties of works council. In accordance with the provisions of the law, works councils were provided the right to advise the management regarding economic plans, including the introduction of new technologies, in order to maximize efficient production; to safeguard the establishment against disturbances, to see whether the decisions of the board of adjustment (*Schlichtungsausschuß*) or other similar

[117] Hugo Sinzheimer, *Eine Theorie des Sozialen Rechts (1936) XIV Zeitschrift für öffentliches Recht*, quoted by Ruth Dukes '*Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the role of Labour Law*' (2008) 35 Journal of Law and Society 3, 346.
[118] Section 66 Para 1 of the Works Council Act of February 4, 1920.
[119] Section 15 of Act on Works Council of February 4, 1920.

agencies are carried out; to draw up or modify factory rules together with the employer; to further the solidarity among employees and to stand up for the rights of workers to organize; to take up complaints of the separate group councils and to affect their redress; to supervise health and safety matters in the establishment; to cooperate in the administration of various welfare plants.

In order to fulfil their tasks, works councils had the right to demand the employer to report on all the practices in the establishments directly effecting the employment or the activity of workers. Works council also had the right to examine wage sheets and other records related to the realisation of existing wage agreements. Both rights could only be exercised if they did not endanger the industrial or trade secrets of establishments.

In case of dismissal of a large proportion of employees due to an expansion, contraction or closing down of the establishments, or due to an introduction of new technical appliances or new technical methods, the works council had to be consulted on ways and means of accomplishing the redundancy of employees to avoid unnecessary hardships upon them.[120]

Employers at establishments which were not part of the wage agreements had to seek the approval of a works council on wage regulations. In case of disagreement, both parties had the right to appeal to the board of adjustment, which rendered the final decision, except when the disagreement was concerned with hours of work.[121]

Works councils had co-determination right concerning dismissals. Employees were given the right to seek the works council support in case of unfair dismissals.[122] Within five days after receiving notice, employees could file a claim to the group council, and in case the group council found the protest justifiable, it had to consult the case with the employer. In case an understanding could not be reached within a week, either the group council or the employee could appeal to the board of adjustment, which rendered the final decision in the case.[123]

ii Right to Information

As it was briefly mentioned above, to enable the works council to efficiently perform their tasks, workers' representatives were granted rights to information, divided into three parts. First, the right to demand information and explanation about all proceedings in the plant which bear a direct relationship to the collective agreement or to the general conditions of work in the plant gave the worker's representative a large insight into the plant. At the same

[120] It is important that neither the timing, nor the proportion of employees to be made redundant were specified by the law; see, Section 74 of Act on Works Council of February 4, 1920.
[121] Section 75 of Act on Works Council of February 4, 1920.
[122] These cases were when the dismissal was allegedly based on discrimination (sex, religion, political or trade union affiliation were mentioned specifically by the law), or were given without stating the reasons, or in case it was given following the employee's refusal to permanently take up a different job than for which the person was hired, or if the notice was an unfair hardship, not justified by the employee's behaviour.
[123] Sections 81-90 of Act on Works Council of February 4, 1920.

time employers were permitted to refuse the workers' representatives any information which was considered as business secret. Since the law did not provide details either on the content of information or the limits of confidentiality, also, it was not specified whether it should be given orally or in writing, the amount and quality of information which was given to workers' representatives depended entirely on the relationship between the works councils and the employer concerned. [124]

Second, the right to examine the wage records and any other data pertaining to the carrying out of the collective agreements constituted more precisely formulated rights. Due to its nature, it had to be provided in writing.

Third, employers were obliged to draw up and present quarterly reports concerning the conditions in the establishments and in trade as whole, with special emphasis on the accomplishments of the establishment and its prospective labour requirements.[125] Moreover, employers which met certain specific conditions[126] had to report to the works council their yearly balance sheets, including loss and profits made during the completed business year.[127]

B Protection of Workers' Representatives

Workers' representatives exercised their function on an honorary basis; the only special protection granted to them was the protection against discharge. Section 96 of the works council law expressly provides that no member of the works council, while in office could be discharged or transferred from one plant to another without the approval of the other members of the works council. When the works council refused to approve the dismissal, the employer could appeal to the board of adjustment, which rendered the final decision on the case.[128] However, the workers' representative could not be dismissed until the decision was delivered. No approval was needed in case of a complete shutdown of a plant or when the workers' representative committed a crime which made him subject to disciplinary dismissal.[129]

[124] Stern gives a detailed explanation on law suits intiated by works councils at the board of adjustment; see, B Stern, supra, 56 ff.
[125] Section 71 of Act on Works Council of February 4, 1920.
[126] Those which employed at least 300 wageworkers or 50 salaried employees and were under the obligation of keeping full accounting; see, Balance Sheet Law of February 5, 1921.
[127] Section 72 of Act on Works Council of February 4, 1920.
[128] Later to the Labour Court.
[129] See Article 123 of the Industrial Code.

IV Evaluation of the Role of Works Council

The abstract nature of the right to advise the management in strategic issues made it difficult to exercise such power in practice, especially in view of the stubborn opposition of the employers' interest groups in the making of the law. There was no provision in the law compelling the employers to consult works councils if they did not wish to do so and works councils had no right to interfere in the management on their own initiative.[130]

Also, no executive power was provided to works councils to force the employers to carry out workplace agreements. The works councils were prohibited from encroaching upon the rights of the management by issuing an order to change existing practices. Thus, the executive powers were vested solely in the management. The ambiguity between the spirit of the law and its actual provisions could also be detected in the vague language used by the lawmaker. As if the repetitions and unclear provisions were to cover the indecisiveness of the lawmaker. This haziness could largely be explained with the political unrest characterizing the post-war times.

The struggle around the legislation mirrored the political battles.[131] The employers were frightened by the aggressiveness of extremist trade unions and soviets which spontaneously sprang up after the 1918 revolution, and gathered increasing political and industrial powers. The amazingly rapid growth in membership of the socialist union was also an alarming sign of their increased power: in October 1918 the socialist unions had a total of 1,648,313 members, while in 1920 the total membership was over 7,000,000.[132] The masses of members demanded the recognition of workers' soviets by the unions, which led to a split within the socialist unions. Thus, the establishment and empowerment of works council represented the interest of capital to pacify the radical left at workplaces, but there was no genuine intention to share managerial prerogatives. Therefore, nominal rights were given to works councils to monitor the compliance of employers' practices with the employment regulations, but it was not accompanied with executive power.

The establishment of works councils was also an acceptable solution for trade unions, to keep extremists outside of gates. In spite of the successful incorporation of the system of works councils, there were fields where trade unions and works councils had to clash with each other. The friction resulted from the different objectives of the two organizations and from the fields of activity.

---

[130] Sections 69, 72 and 82 of Act on Works Council of February 4, 1920.

[131] It has to be also noted that the coming into force of the Act of Works Council coincided with the Kapp Putsch, which was a coup attempt in March 1920, aimed at undoing the results of the German Revolution of 1918–1919, overthrowing the Weimar Republic and establishing a right-wing autocratic government. It was supported by parts of the military and other conservative, nationalistic and monarchist forces.

[132] A possible explanation given by Stern to the phenomena is that the returning soldiers and the unorganized and untrained workers who joined the German soviets automatically became members of the local trade unions. Stern quotes his data from the Special Annex to the *Reichsarbeitsblatt*, 1924, Nos 1-2. See, B Stern, supra, 62, 64.

The regulations concerning works council interfered with the already existing schemes of trade union operation. Members of works councils and shop stewards (*Betriebsobmann*)[133] [134] ought to organise themselves into works council groups corresponding with the industrial divisions. Memberships in these works council groups were determined by virtue of being employed in a plant belonging to a certain industrial group. It meant that workers' representatives belonging to the same union, if employed in different industrial groups also belonged to different works council groups. Thus, all the workers' representatives of a single establishment had to belong to the same works council organizations. Also, this scheme reinforced industry-based trade union organisations (majority of the socialist unions had already been organised industrially) over craft-based ones, further polarising trade unions.

According to the theory of 'economic constitution', works councils were supposed to be first and foremost representatives of workers at the establishment and they were in charge to protect all employees regardless of their union affiliation. Moreover, works councils were in charge to safeguard industrial peace within the establishment to ensure continuous, high level productivity. Thus, responsibilities of works council would have had to supersede those of the unions. Some of the unions, therefore, complained that the operation of works councils hamper the growth of trade unions within the establishment.[135]

A clash between trade unions and works councils was also apparent with regard to the issue of strikes. As the keepers of industrial peace, the law obliged works councils to prevent strikes or any other action interfering with the continuation of production, and even in case a strike was called by a trade union, workers' representatives were not permitted to lead the action. Moreover, the members of the works council could be found liable, individually or jointly for the interruption of production, and the individual members or the whole council could have been impeached by a board of adjustment. Thus, admittedly, work councils successfully helped pacifying industrial conflicts, as they had an important role in preventing major wildcat strikes during the 1921-23 inflation, which caused the rapid devaluation of the mark and led to weekly changes of the Government food index, which was the basis of wage calculation.[136] The limitations regarding strike activity have remained a distinguishing element of the rights and duties of works councils.[137]

The concept of an economic constitution and the idea of works councils have long survived the overthrow of the Weimar Republic.[138] The economic democracy theory was much more than the transfer of parliamentary forms of democracy to workplaces, but more importantly it conveyed the principle of democracy and the resolving of industrial conflicts

---

[133] Shop stewards had to be elected at establishments employing at least five, but less than 20 employees (Section, 2, 15 and 70-71 of Works Council Act of February 4, 1920,).

[134] Shop stewards had to be elected at establishments employing at least five, but not more than 19 employees (Section 2 of Works Council Act of February 4, 1920).

[135] ILO Studies Series B No 6.

[136] B Stern, supra, 37.

[137] M Biagi and M Tiraboschi 'Forms of Employee Representational Participation'' in R Blanpain (ed) *'Comparative Labour Law and Industrial Relations in Industrialized Market Economies'* (9th and revised edition) (The Netherlands, 2007, Kluwer Law International) 470.

[138]For a detailed analysis of the Weimar Republic see, P Fritzsche *'Did Weimar Fail?'* (1996), 68 The Journal of Modern History 3, 629-656; and H Mommsen, *'The rise and fall of Weimar democracy'* (UNC Press Books, 1998).

through dialogue. The Works Council Act incorporated the duty of an employer to consider not only the interests of shareholders, but also those of the employees. The contemplation of employees; interest improved the living and working conditions of workers and thus largely contributed to better social development. Participation also introduced an important limitation on the misuse of economic power of employers. By establishing the long-term development of an establishment as a shared goal of labour and capital, the responsibility for the economic decision was also shared between the parties, but in a proportionate manner, which created a productive balance of interest. When seen this way, participation was an important factor in the stabilisation of the economic and social order. Last but not least, the Weimar model of participation chiefly influenced the current employee involvement system of Germany, which has had further impact on the European model of participation.

Chapter 2
Employee Involvement as a Question of Economic Competitiveness

Employee involvement has been in the focus of economic researches for decades, and its importance is still extraordinary. The necessity to improve workers' influence on management decision making is not any lesser in the quest for competitiveness of the 21st is apparent. However it shall not be overlooked that even in times when efficiency has had a major influence on labour regulations the primary goal of labour law is to balance the power-inequality between labour and management, employers and employees.

The methods how decisions are made naturally affect the dynamics of the enterprises and have been studied by many economic scientists related to corporate theories.[139] The more participants are involved in decision making, the longer it takes to reach a conclusion, therefore the more expensive the process becomes.[140] Costs include direct and indirect elements, such as the time spent by management preparing for the information and consultation processes. In a competitive environment though, it is argued that only those firms are able to survive that deliver their products demanded by customers at the lowest price while covering costs.[141] Also, the time delay could easily eliminate profitable market options that require prompt responses from the economic players.[142] Moreover, producing outputs at the lowest cost is in the utmost interest of the residual claimants[143] of the company as it increases net cash flows. Thus, employees' interest in involvement is contrary to that of the residual claimants.

Although, it has also been argued that information asymmetries can produce negative outcomes. First, the insufficient information flow between management and ownership leads to increased agency cost.[144] Second, the lack of exchange of information between labour and management could also create inefficient social outcomes: workers may fail to inform the management about ways to improve production efficiency, or if employees' needs for voice

---

[139] For example A A Berle and G C Means, '*The Modern Corporation and Private Property'* 2nd edn (New York, 1967, Harcourt, Brace and World) (originally published in1932); M C Jensen and W H Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure* (1976) Journal of Financial Economics, October; E F Fama and M C Jensen, *Separation of Ownership and Control* (1983) 26 Journal of Law and Economics 2.

[140] R B Freeman and E P Lazear, *An Economic Analysis of Works Councils, in Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*, in R Streeck (eds) 1995:42.

[141] A A Alchian, *Uncertainty, Evolution and Economic Theory*, (1950) 58 J Poll. Econ. 211.

[142] Freeman and Lazear 1995:44.

[143] The residual claimants are those who receive the remainder of the sum after all costs have been accounted for. See Fama and Jensen, 1983:303.

[144] Berle and Means, 1932: 124. For more detailed explanation on the principal-agent problem and agency cost, see, n 171.

remain unheard, employees may choose to exit, thus creating more direct and indirect costs for an enterprise.[145]

Thus the economic input of employee involvement could not be overseen. Many hypotheses exist on both sides, aiming to prove either the inefficiency or the efficiency of employee involvement.

In the following section examples of various economics theories dealing with participation will be introduced first, then empirical data from recent researches will be discussed. The following table gives a comprehensive overview on the presented economic theories related to employee involvement.

Employee Involvement (EI) in Economic Theories		
	AGAINST Employee Involvement	FOR Employee Involvement
I. Efficiency Theories	**Jensen and Meckling**	**Freeman and Lazear**
	EI is not chosen by managers as an efficient solution EI conflicts with profit-maximization Shareholder will rather choose inherent agency costs	EI could effectively improve productivity EI enlarges the total 'pie' what stakeholders need to share (but, works councils often cause the 'prisoner's dilemma')
	*Employee involvement could not fulfil its role as a voluntary instrument *Sufficient rights must be allocated to employee representatives in order to realize the additional economic surplus *Employee's participatory rights shall be safeguarded in front of employers and trade unions	
II. Path Dependence Theories	**Hansmann and Kraakman**	**Deakin**
	The shareholder-owned corporation has survived Company should be run for the shareholders' interest EI forces companies to remain with an inefficient result	Winning model was the best in a certain past environment The model is not necessarily the most optimal in the future (therefore, institutional survival is not decisive)
	"Market participants have a natural tendency to adopt the practices of the majority" (Boyd and Richerson) "Markets have a natural preference for the present state and oppose changes" (Kahan and Klausner) "The 'natural selection' by itself will not automatically eliminate all inefficient structures" (Bebchuk and Roe) *Expecting EI to be voluntary adopted in national systems which do not traditionally encourage EI would be futile	
III. Property and Human Capital Theories	**Becker**	**Blair**
	Employers are willing to invest in firm-specific trainings	All parties who invested in the firm should share the rights in ownership including control rights i.e. decision-making
	"Having the fear that the employer strips them off, employee will underinvest their human capital to the firm"	
IV. Human Resource Management Theories	**Kandel and Lazear**	**Leana**
	EI increases the agency problem and the related cost (the process gets sluggish due to more participants involved)	EI increases the employee's commitment and trust EI reduces alienation and resistance towards changes EI motivates employees to work harder
		Brown and Cregan
		Information sharing and involvement in decision-making successfully reduce organizational change cynicism
	*When it's not accompanied by the sincere intention of management, employees quickly lose interest in EI *This 'voluntary' withdrawal from EI could lead to the false impression that employees are not interested in involvement	
V. Behavioural Economic Theories	**Taylor**	**Mayo**
	Productivity can be influenced by changing working patterns, break times and monetary incentives	Productivity can be influenced by recording reactions, opinion and thoughts of workers
		Simon and Blumberg
		The productivity of Hawthorne workers did go up because they could genuinely participate in workplace decisions

Table 1. Employee Involvement in Economic Theories (own compiliation).

[145] Fama and Jensen 1983: 33.

I Efficiency Theories

The economic analysis of employee involvement started with the emblematic question of Jensen and Meckling asking "if co-determination is so efficient, why do managers not choose it voluntarily?"[146] They argue that the firm is a "black box"[147] operating in a way to maximize profit and inside this black box there is a nexus of contracts that regulate the relationships between the individuals. Thus the firm is a legal fiction where the conflicting objectives of individuals are balanced by the framework of contractual relations. Models denying the principle of profit-maximization are rejected by the market and employee participation is eventually abandoned for the traditional shareholder formation despite its inherent agency costs.[148]

In their response to the Jensen-Meckling theory, Freeman and Lazear claim that forms of employee involvement could effectively improve productivity.[149] In sum, employee involvement enlarge the total 'pie' what owners and employees need to share, but eventually owners tend to end up with a smaller slice altogether. Thus, absent fiat, employee involvement is not encouraged at enterprises and employers provide less power than socially optimal for institutions fostering employee involvement. Analogously, since the size of the pie gets larger by the greater power of the works councils, employees would prefer to have more power than optimal. The optimum level of power sharing also depends on the bargaining system of the country where the firm operates. The figures suggest that employee involvement fits better to the labour relation systems where pay and other elements of the compensation are determined outside of the company through relatively centralized collective bargaining.[150]

Regarding the voluntary or mandatory nature of the works councils, Freeman and Lazear came to the conclusion that despite the fact that many of the analysed firms voluntary established employee involvement to avoid unionization, most abandoned them, as the insufficient power they had been provided for alienated workers and they stopped cooperating. Without real power to affect decision many firms eventually introduced wages and employment conditions in a unilateral manner. This pattern highlighted the 'prisoner's dilemma'[151] showcasing the cooperating-defecting solutions of works councils. When the gains from employee involvement, like any other cooperative arrangements, are based on long-term benefits, austerity measures discourage the operation of voluntarily established institutions.[152]

---

[146] Jensen and Meckling 1976:9.
[147] The idea of the black box appeared first at Berle and Means 1932.
[148] Jensen and Meckling 1976:71-72.
[149] The analysis was specifically focusing on the operation of works councils in private enterprises.
[150] Freeman and Lazear 1983: 32.
[151] The prisoner's dilemma is an example of a game analysed in game theory that shows why two individuals might not cooperate, even if it appears that it is in their best interests to do so. It was originally framed by Merrill Flood and Melvin Dresher. See, http://www.econlib.org/library/Enc/PrisonersDilemma.html
[152] Freeman and Lazear 1983: 33.

It is also argued that the benefit of information sharing depends on the economic certainty or uncertainty. Management often relies on employee representative to transmit 'bad news' such as plant closure to the workers, as their credibility is greater than that of the management. By contrast, in affluent times, the information given to the employees through their representatives is at the expenses of management. Though, the analytics suggest that the social gains of full information, including profit information, would be especially valuable regardless of the economic situation, as it could increase flexibility within the organization.[153] Apart from information sharing, consultation also could create enterprise surplus, as new solutions to firm-specific problems that neither party would have revealed separately could be discovered as an outcome of the teamwork. However, it is argued that workers only provide information that management does not have if they are empowered with the right to propose solutions.

As a final conclusion Freeman and Lazear suggest that the social gains from employee involvement could only be maximized if the rules governing information and consultation processes are carefully bound the power of both labour and management, as well as fit the broader industrial relations system in which the representative bodies function.[154]

Based on the above arguments, it could be summarized that employee involvement could not fulfil its role as a voluntary instrument. Moreover, sufficient rights must be allocated to employee representatives; otherwise the additional economic surplus could not be realized. Participatory rights of employees shall be safeguarded both in front of employers and other parties of industrial relations, notably trade unions.

II Path Dependence Theories

The neo-classical approach to corporate governance applies the Darwinian notion of the survival of the fittest and envisages a process of natural selection within the market which only allows the most efficient formation to survive. The heavily contested[155] proposal of Hansmann and Kraakman on The End of History for Corporate Law,[156] suggests that the shareholder-owned corporation has triumphed the contest for survival in the global market, and there is no need for future research for any alternative models. Hansmann and Kraakman argue that there is a "normative consensus" that corporate leaders should run the company in the best interest of their shareholders. Models designed to foster employee involvement are

[153] Freeman and Lazear 1983: 39.
[154] Freeman and Lazear 1983: 50.
[155] See for example D Kershaw, '*No End in Sight for the History of Corporate Law: The Case of Employee Participation in Corporate Governance' (2002)* 2 Journal of Corporate Law Studies 34; J Michie and C Oughton, '*Employee Participation and Ownership Rights'*, *(2002)* 2 Journal of Corporate Law Studies 34.
[156] H Hansmann and R Kraakman, *The End of History of Corporate Law*, (2001) 89 Georgetown Law Journal 439.

seen as misguided experiences that forces companies to remain with a less than efficient result.[157]

The evolutionary theory of Hansmann and Kraakman was contested in the ground[158] that evolution is not a unidirectional process, but an open-ended one where the possibility of reform exists.[159] Deakin argues that the evolutionary theory proves not more than the winning model was able to adapt to a certain past environment the best. It does not mean however, that this model is the most optimal or that it would be the most suitable one for present or future markets.[160] Deakin's argument emphases the importance of adaptability: he states that corporations adjust to specific market conditions without any quest for optimality. Adaptation is a long process which is shaped by historical conditions. Thus, according to Deakin, institutional survival, or even supremacy, is not decisive.[161]

Theories related to path dependency suggest that the predominance of suboptimal corporate governance systems excluding employee involvement has no reference to efficiency. Boyd and Richerson argue that market participants have a natural tendency to adopt the practices of the majority, assuming that this is the optimal choice. They named this phenomena "frequency dependent bias", whereas the preconception is based only on the frequency of the practice and not an efficiency evaluation.[162] Correspondingly, Kahan and Klausner imply that markets have a natural preference for the present state and oppose changes, regardless of the efficiency associated to the existing model. Such status quo may not only be present due to the blind imitation of other firms, but also to the high costs of the implementation of an even superior form of governance.[163]

The effects of path dependency in corporate governance were well studied in the different works of Roe.[164] Roe explains the different factors lying behind path dependence, such as culture, politics and legal systems; therefore opting-out from the established system is extremely difficult despite the existence of more efficient alternatives. Thus, the high transition costs of deviation may lock out socially desirable innovations.[165]

Together with Bebchuk, Roe further argues that significant sources of path dependency can be detected in corporate ownership and corporate rules of the different countries even though their economies might be quite similar to each other.[166] Two types of path dependency were identified by Bebchuk and Roe, one of which is efficiency based. It is argued that even assuming that a country's legal regulations were created solely for higher

---

[157] Wanjiru Njoya, '*Employee Ownership and Efficiency: An Evolutionary Perspective*,' (2004) Ind. Law J. Vol. 33. No 3, 214.
[158] Among others.
[159] Njoya, supra 214.
[160] S Deakin, '*Evolution of our Time: A Theory of Legal Memetics'* (2002), University of Cambridge, Working Paper No. 242; in support of A Alchian, '*Uncertainty, Evolution and Economic Theory*' (1950) 58 J of Pol. Econ, 211.
[161] Deakin, 2002, supra, 25.
[162] R Boyd and P J Richardson, '*Culture and the Evolutionary Process'* (University of Chicago Press, 1985).
[163] M Kahan and M Klausner, '*Path Dependence in Corporate Contracting: Increasing Returns, Herd Behaviours and Cognitive Biases*' (1996) 74 Washington University Law Quarterly 347.
[164] For example, M J Roe, '*Chaos and Evaluation in Law and Economics*' (1996) 109 Harvard Law Review 641-68; M J Roe '*Can Culture Constrain the Economic Model of Corporate Law?' (2002)* 69 Chicago Law Review 1251.
[165] Njoya, supra, 218.
[166] L A Bebchuk and M J Roe '*A Theory of Path Dependency in Corporate Ownership and Governance*' (1999) Columbia Law School, Working Paper Series No 131.

efficiency, the already existing patterns of ownership and governance influence the relative efficiency of the rules. The discussion illustrates that the 'natural selection' by itself will not eliminate inefficient structures as long as player recognize it as optimal for their own operation. In an example Bebchuk and Roe made, even if in Germany employee co-determination laws changes and make a dual corporate board optional rather than mandatory, as long as labour leaders and other players benefit from co-determination and they have the power to resist changes, the existing model will survive regardless of its efficiency. The reason is that not only value maximization and self-interest govern the choice of decision makers regarding corporate governance, but culture and ideology as well. Even though increasing global competition should discourage companies from following inefficient models, globalization so far has not resulted either in the obliteration of outdated models or in standardization. Another example of Bebchuk and Roe is the case of the European Company. Even though the European Commission has been promoting the idea of Societas Europea, arguments between the Member States over matters like employee involvement are still continuing. Their analysis demonstrates that regardless of how easy is to impose standardized rules by the central political will countries remain to follow their already existing patterns. It should not be overlooked either, as they argue further, that escaping from an inefficient system by reincorporation is extremely costly.

Further to the above arguments, it could be noted that the lack of effective employee involvement might not be due to the inefficiency of the instrument, but to the path-dependency of the national corporate governance systems. Thus, expecting corporations incorporated in national systems which do not traditionally encourage employee involvement to voluntary adopt such system would be futile.

III Property and Human Capital Theories

Property rights theories in economy have addressed the problem of specification of individual rights that determines how costs and rewards are allocated among the participants of the organization.[167] As it was stated above, firms have been seen as legal fictions, a nexus of contracts, whereas individual behaviour in organizations, like managers, employees or stock owners is greatly affected by these contracts.

Specific attention has been given to contracts determining the relations between owners and managers, more precisely to those which are separating ownership and control.[168] The separation of ownership and control leads to an agency relationship, where the principal engage another person, the agent, to perform services on behalf of the principal which includes the delegation of decision making authority to the agent. Delegation of authority to agents (managers) leads to agency cost, which occurs as the sum of the monitoring

[167] Started with Ronald Coase's theory and was extended by Alchian, Demsetz and others.
[168] Jensen and Meckling, supra, 1976 at 6.

expenditures by the principal, the bonding expenditure of the agent and the residual loss. In public companies the agency cost is borne by the shareholders, as owners bear the residual risk in the firm. In this model employees are not owners, as they do not bear the residual risk, since they decided not to shoulder the residual risk and to remain at arm's length by contracting for a fixed sum by way of return.[169] Thus, as claimed by Jensen and Meckling, it is efficient to vest ownership in shareholders and not in employees.

Property theories disregard two social and economic considerations. First, in years of economic constraints employers (managers) increasingly tend to share the residual risks arising from economic uncertainty with employees by lowering wages, deteriorating working conditions or reducing the level of health and safety protection. This forced participation in economic risks indeed lower costs, but leaves the gate open to different forms of exploitation. Second, knowledge-intensive production greatly relies on highly skilled employees with significant firm-specific knowledge. Many economic theories suggest that specialized investments could gain a critical importance in determining the boundaries of firms and the allocation of risks, rewards, and control rights within firms.

In his seminal work on human capital, Becker explores the training investments employer and employees would make.[170] According to his argument, in a competitive labour market employers are only be willing to invest in firm-specific trainings and not in those that are aiming to improve the general skills of their employees, as they will not be able collect the returns from the latter investment. The reason is that employees will be able to use the general knowledge at other companies if they choose to exit, whereby the specific knowledge will discourage them from leaving the employer. The firm-specific human capital will only make employees more productive at their original employers.[171] Thus, it would bring the employer and the employee to be in a 'bilateral monopoly position'.[172] The firm-specific knowledge increases employee's bargaining power[173] as replacing workers with special skills will impose high costs on the employer. It is also argued that in knowledge-intensive industries, like at automotive companies, employees are typically paid on an hourly basis and several incentives are available to reduce turnover, while, by contrast, employees in the garment industry are often treated similar to subcontractors and additional benefits are seldom offered to them.[174]

Margaret Blair argues for combining property and human capital concepts.[175] She proposes that if ownership involves the right to make decision (control rights) and the owner receive whatever is remaining after all payments specified by other contract have been paid, all parties who invested in the firm, including shareholders and employees, should share the

---

[169] Njoya, supra at 223.
[170] G Becker '*Human Capital*' (University of Chicago Press, 1964).
[171] E P Lazear '*Firm-Specific Human Capital: A Skill-Weights Approach'* (2003) NBER Working Paper, Cambridge, No 9679.
[172] A S Kessler, C Lulfesmann '*The Theory of Human Capital Revisited: On the Interaction of General and Specific Investments*' (2002) CESifo Working Paper No. 776.
[173] While further developing Becker's theory, Lazear argues that the combination of the general and firm-specific knowledge has the binding effect the bargaining power of the employees. See, Lazear, supra at 4.
[174]B Holmstrom and P Milgrom *'The Firm as an Incentive System*' (1994) 84 The American Economic Review 4, 972-991 and 988-989.
[175] M M Blair '*Firm-specific Human Capital and Theories of Firm*' (1999) Georgetown University Law Center, Business, Economics and Regulatory Policy, Working Paper No 167848.

rights entangled in ownership.[176] Naturally, human capital is not easily tradable and neither the firm nor any of its participants can own it. Nevertheless, she argues further, where firm-specific human capital is important, property rights need to point toward employee control of the firm or at least participation in management. Otherwise employees, having the fear that the employer strips them off from the rents earned by the assets, will underinvest their human capital to the firm. Such action could negatively affect competitiveness, especially in knowledge-intensive production.

Though the idea of risk-sharing has quickly (re)gained popularity, employees' right to involvement in decisions that significantly affect their daily living has not yet attracted that much recognition, not even as mean to retain skilled workforce.

IV Human Resource Management Theories

Human resource management deals with policy areas like selection, training, job design, compensation, performance appraisal, communication, and employee relations. Employee involvement, from a human resources management view, acknowledges that employees and employers have different but legitimate interests in the employment relationship. Managers are no longer seen as the sole custodians of authority, and employees are able to bring their workplace experiences to the decision-making table, therefore decisions are better supported. Involvement in decision making provides employees with an opportunity to examine management's motives and the consequences of various options before settling on a binding decision. Thus, it has long been in the scope of human resource management researches and has been studied from an organizational efficacy point of view,[177] and has been argued to have both negative and positive impacts. Findings suggest that at workplaces where employees had a greater amount of influence on decision making both the satisfaction level and productivity of workers are higher.[178] However, it has been also argued that the magnitude of the positive effects of employee involvement is so small that it casts doubts about the overall practical benefits of the instrument.

The usual critical standpoint of employee involvement from human resource management point of view is related to the effects of the traditional agency problem,[179] which

---

[176] M M Blair, supra, 59, 78.

[177] See D H Peter and B Wilpert '*Conceptual Dimensions and Boundaries of Participation in Organization: A Critical Evaluation*' (1978) 23 Administrative Sciences Quarterly, 1-40; E Locke and D M Schweiger, '*Participation in Decision Making: One More Look, Research and Organizational Behaviour*' (1979) 1 Greenwich Conn: JAI Press.

[178] S Schiwochau et al, '*Employee Participation and Assessments of Support for Organizational Policy Changes*' (1997) Journal Of Labour Research, Vol. XVIII, No 3, 379.

[179] The principals, or owners of the firm hire agents, or managers, to run the firm in the best interests of the principals. But ethical lapses, self-interest, or the owners' lack of trust in the managers can lead to conflicts of interest and suspicions between the two parties. This problem in corporate governance is called the principal-agent problem. The principal-agent problem imposes agency costs on shareholders. Agency costs are the tangible and intangible expenses borne by shareholders because of the self-serving actions of managers. Agency

negatively influences the organizational outcomes. Kandel and Lazear argue that the delegation of decision making rights to workers increases the agency problem as the more participants are involved, the more sluggish the decision-making process becomes. The increased costs, the time and the efforts to coordinate the decisions are likely to have negative effects on the overall performance of the firm.[180]

On the other hand, the findings of Leana suggest that involvement increases the employee's commitment and trust, reduces alienation and resistance towards changes. These factors motivate employees to work harder, which leads to increased productivity. Also, participation programs could enhance organizational performance by providing information to managers that is not otherwise revealed to them with autocratic management methods.[181] Further to Leana's findings, Brown and Cregan demonstrate that information sharing and involvement in decision making successfully reduce organizational change cynicism.[182] However, it has been increasingly being recognized that when the different techniques of information sharing and participation are not accompanied by the sincere intention of management to involve workers to decision making, employees quickly lose interest in employee involvement. This 'voluntary' withdrawal from participation could lead to the false impression that employees are not interested in involvement.

V Behavioural Economic Theories

Behavioural economics is a method of economic analysis that applies psychological insights into human behaviour to explain economic decision-making.[183] It gained attention in the 1950, as a new direction in microeconomics and after the financial crisis in 2007 it has become mainstream. Formerly, descriptive microeconomics was relatively uninterested in the behaviour of individual economic agents, unless if it was necessary to provide a foundation

---

costs can be explicit, out-of-pocket expenses (sometimes called direct agency costs) or more implicit ones (sometimes called implicit agency costs). Examples of explicit agency costs include the costs of auditing financial statements to verify their accuracy, the purchase of liability insurance for board members and top managers, and the monitoring of managers' actions by the board or by independent consultants. Implicit agency costs include restrictions placed against managerial actions (eg, the requirement of shareholder votes for some major decisions) and covenants or restrictions placed on the firm by a lender. The shareholders of a firm elect a board of directors. In theory, the board's role is to oversee managers and ensure that they are working in the best interests of the shareholders. In practice, however, the board often has a closer relationship with management than with the shareholders. For example, it is not unusual for the firm's top executives to sit on the firm's board of directors, and the firm's top executives often nominate candidates for board seats. These relationships can obscure loyalties and make the board a toothless watchdog for shareholders' interest. See, Encylopedia of Finance (2006, Springer) 11-12, 204.

[180] E Kandel and E P Lazear '*Peer Pressure and Partnerships, Journal of Political Economy'* (1992), 100 Journal of Political Economy 4, 801-17.

[181] C R Leana '*Power Relinquishment Versus Power Sharing: Theoretical clarification and empirical comparison of delegation and participation*' (1987) 72 Journal of Applied Psychology; C R Leana and G W Florkowsi '*Employee Involvement Programs: Integrating Psychological Theory and Management Practice'* (1992) 10 Research in Personnel and Human Resources Management.

[182] M Brown and C Cregan '*Organizational Change Cynicism: The Role of Employee Involvement*' (2008) 47 Human Resource Management 4, 667-86.

[183] Oxford Dictionary.

for macroeconomics. The normative microeconomics did not need a theory of human behaviour either, from its perspective it only had relevance how people ought to behave, not how they do actually behave. Thus, the classical economic theories of markets with perfect competition and rational agents were considered as deductive theories that did not require contact with empirical data once their assumptions were accepted.[184]

Combining psychology with economic models has brought a completely new perspective. Rather than correlating statistical data, or interviewing and surveying people on their views, it uses psychological experiments to test how people react to particular changes to their environment. Behavioural economics tried to offer an answer to the question, why 'individual economic agents' behave seemingly unreasonable, eg, acting against their self-interest? It has affected the theories of firms as well, and promoted that firms should aim for satisficing, rather than maximizing their profits. The notion of satiation did not play a role in classical economic theories, while it enters rather prominently into the treatment of motivation in psychology. As Herbert A Simon explains the revelation, "[i]n most psychological theories the motive to act stems from drives, and action terminates when the drive is satisfied. Moreover, the conditions for satisfying a drive are not necessarily fixed, but may be specified by an aspiration level that itself adjusts upward or downward on the basis of experience. If we seek to explain business behaviour in the terms of this theory, we must expect the firm's goals to be not maximizing profit, but attaining a certain level or rate of profit, holding a certain share of the market or a certain level of sales. Firms would try to <satisfice> rather than to maximize."[185]

Behavioural economists have influenced labour law in basically four major fields: the effect of fair pay on the motivation to work; the effect of security in pay on productivity; the relevance of participation rights and job satisfaction in the workplace; and the differences between opting in and opting out of workplace schemes such as occupational pensions.[186] It is argued that researches concerning the above questions confirm that labour rights which correct inequality of bargaining power, protect security in pay, and promote workplace participation are able to redress considerable market failures. In this subchapter I will devote attention to studies related to participation, as well as to those which examine the effect of opting out in compulsory workplace schemes.

A Behavioural Economics and Participation

Probably the first experiment which had implications to workplace participation was the 'Howthrone experiment' conducted by Elton Mayo at the Howthrone Works of the Westerns

[184] H A Simon, '*Theories of Decision-Making in Economics and Behavioral Science'* (1959) 49 The American Economic Review 3, 254.
[185] Ibid, 263.
[186] For an excellent overview considering both legal and economic reasoning see, E McGaughy, '*Behavioural Economics and Labour Law*' (2014) 20 LSE Legal Studies Working Paper.

Electric Company in 1924.[187] Mayo's experiment competed with the 'scientific management' theories of Taylor.[188] While Taylor wanted to prove that he could influence productivity by changing working patterns, break times and monetary incentives, treating workers as a sort of 'intelligent gorillas', Mayo's studies, by contrast, wanted to influence productivity by recording reactions, opinion and thoughts of workers. The intended major aim of the Hawthorne experiment was to check the effect of lighting intensity on production. However, due to technical problems, the very research did not lead to any results, so they continued the experiments with work times and break times. The observers were instructed to consult workers when they would prefer to have breaks and what sort of meals they would want. Productivity went up significantly when meals were given and brakes were introduced, but even more curious, productivity continued to improve even after these benefits were removed.[189]

Though Mayo did not get what he wanted from his experiment, later his data have been studied and have continued to be studied today.[190] It was first Herbert A Simon who drew conclusion for behavioural economics, soon followed by sociologist Philip Blumberg.[191] They both concluded that the productivity of Hawthorne workers did go up because they could genuinely participate in workplace decisions, in a way which was construed more the mere information and consultation. This could serve an explanation why workers continued to work productively even though the offered benefits were taken away.[192]

The conclusion of Simon and Blumberg was reinforced by a series of experiment conducted recently by Dan Ariely, Emir Kamenica and Drazen Pralec at Massachusetts Institute of Technology and Harvard University.[193] In the first test at MIT a group of students were asked to find at least ten occurrences of two 's' together on sheets of paper with random letters printed on them. They would be paid 55 cents for the first sheet, and 5 cents less for each subsequent sheet. They could all stop working whenever they felt like it, so that the participant had to determine whether the diminishing return warranted the continued work. The participants' work was, however, handled in three different ways. In the first group, when the 'ss' were found, the participant was instructed to write their name on the paper, and the experiment observer would file the sheet in a folder ('Acknowledged'). In the second group, the participant was not told to write down a name, and the observer simply put the sheet on the top of a big stack of papers ('Ignored'). In the third group, the observer promptly put the

---

[187] Even though the intended purpose of the experiment was not related to participation.

[188] F W Taylor '*The Principles of Scientific Management*' (1911). The term 'scientific management' was introduced by Louis Brandeis in his advocacy before the Interstate Commerce Commission in 1910, Testimony (1916) vol 8, 7659-7660, LD Brandeis, The Fundamental Cause of Industrial Unrest (1916) 7672, cited by E McGaughy supra, 21.

[189] E Mayo, *The Human Problems of an Industrial Civilization* (1933).

[190] See for example, R H Franke and J D Kaul, '*The Hawthorne experiments: First statistical interpretation'* (1978), American Sociological Review; JD Adair, '*The Hawthorne effect: A reconsideration of the methodological artefact'* (1984), Journal of Applied Psychology; SRG Jones: '*Was there a Hawthorne effect?'* (1992) American Journal of Sociology; G Wickstrom and T Bendix, '*The Hawthorne effect'* (2000) Scandinavian Journal of work, environment and health.

[191] H A Simon, 'Recent Advances in Organization Theory', in S K Bailey (ed) '*Research Frontiers in Politics and Government'* (1955); P Blumberg, *Industrial Democracy: The Sociology of Participation* (1968).

[192] Different conclusions were drawn by O E Williamson, '*The Economic Institutions of Capitalism'* (1985) 40-41.

[193] Dan Ariely, Emir Kamenica and Drazen Pralec, '*Man's search for meaning: The case of Legos'* (2008) 67 Journal of Economic Behavior and Organization, 671-77.

sheet of paper through a shredding machine ('Shredded'). The result was that more participants kept working longer when their work was acknowledged. The 'Acknowledged' participants completed an average of 9.03 sheets, the 'Ignored' participants 6.77 sheets, and the 'Shredded' participants completed 6.34 sheets on average. It is captivating, however, that the performance of those who were ignored was almost as unproductive as people whose work was shredded.

In the second experiment, a group of test subjects at Harvard University were asked to assemble Lego figures called 'Bionicles'. The participants were paid $2 for the first one and then 11 cents less for the next one, and so on, until the participant was paid 2 cents for the twentieth Bionicle. At some point, each participant would find it ceased to be worth their time to continue building. Again, the participants were divided into two groups with different conditions. The first group of participants would build their Bionicles and the observer in the room would put the Bionicles under the table. The Bionicles' of second group of participants were immediately dismantled by the observer in the front of participants' eye. Thus, these participants would have to rebuild Bionicles that had just been built and then dismantled. Every participant was paid on the same scale. When the Bionicles were not dismantled, the average number built was 10.6, and when they were dismantled, the average number built was 7.2.

Ariely *et al* concluded that people, whose work is ignored, disparaged, discredited, feel less motivated to keep working because they see that continued effort produces more harm than reward. There are many ways in which people at work could be acknowledged. Company managements can simply ensure that they foster a culture of recognition, and ensure that people in the organisation are not left behind. They also suggest that the results may also have prescriptive implications for educating labourers about the goals of their work. This implies participation through work councils, representation on the company board and collective bargaining by trade unions.[194]

B Behavioural Economics and Opting-out in Compulsory Workplace Schemes

Sunstein asks in a thought-provoking article that if workers 'wanted' to, why not let them give up of the right to a fair dismissal or the right to not be discriminated against on grounds of age, or to join a trade union?[195] The answer to all of these ideas would seem to be that an opt-out would amount to the abolition of the right, and a minimum floor of rights which rectify inequality of bargaining power promote economic productivity: a route to human development.[196] Mitigating inequality of bargaining power between employers and workers, who enter the workplace as isolated individuals, has always been the role of labour law.[197]

---

[194] See, E McGaughy, supra, 24.
[195] C R Sunstein, *'Human Behavior and the Law of Work'* (2001) 87(2) Virginia Law Review 205,
[196] A more detailed argument on pros and cons related to opting out could be found in E McGaughy, supra, 28-30.
[197] O Kahn-Freund, The Labour and the Law' Hamlyn Lectures Series' (Stevens and Sons, 1972).

To maximize the protection of information and consultation rights of employees, there is a reoccurring idea on works council that would make compulsory at workplaces to set up and operate works councils.[198] Regulations concerning the setting up a works council are mostly constructed as *lex imperfecta*, meaning that the violation of the regulations is not sanctioned; or, if we consider having no information or consultation provided to workers a sanction itself, as *lex minus quam perfecta*. Also, statistics show that there are much less works councils operating compared to the number of workplaces where employees would be able to set up their representative organ.[199] The arguments go as if it was compulsory to set up a works council at every workplaces which otherwise meet the legal requirement (usually related to the size of the undertaking or the establishment[200]); there were a significant increment in the number of works council operating.

This inspiration might be routed in two principles of human choice that had been acknowledged by economic theory for some time, but which behavioural economics had confirmed. First, people have a tendency to think more in the immediate rather than in the long term. Second, that people have a tendency to prefer the status quo to change. Regarding the first issue, it is argued that employees do not recognize the potential benefit of setting up an information and consultation body for themselves during regular business operation, and they could easily become unarmed when participation suddenly appears to be more important, like in the course of downsizing or other business turmoil. In 1848, John Stuart Mill had contended in Principles of Political Economy that while *laissez faire* was the best general principle, several important exceptions have to be recognised. One of these exceptions was 'when an individual attempts to decide irrevocably now, what will be best for his interest at some future and distant time' because we tend to make better decisions when "judgment is grounded on actual, and especially on present, personal experience."[201] Mill was concerned with contracts for a long term, or for perpetuity, and argued that such contracts should not be enforced. This prediction could be justified by the principle is applicable to compulsory pension savings, where younger people would not predict their future need and save, because the decision to not have saved would be irrevocable in later life.[202]

Regarding the second part of the argument, since people tend to prefer status quo to change, the compulsory model of works council would be anyway operated. Richard Thaler and Cass Sunstein wrote in their popular book '*Nudge: Improving Decisions about Health, Wealth, and Happiness'* that default rules may be set according to what society deems

---

[198] Probably the strongest advocate of this idea in Hungary is T Prugberger, see, I Horváth and R Rácz (eds) (2004) 71.

[199] On the issue of 'no right to information and consultation without representation' see, E Ales 'Information and Consultation within the Undertaking' in T Blanke, E Rose, H Voogsgeerd and W Zondag (eds) *Recasting Worker Involvement? Recent trends in information, consultation and co-determination of worker representatives in a Europeanized Area* (Groningen, 2009, Kluwer) 10.

[200] For example the scope of Directive 2002/14/EC defines that the Framework Directive shall apply, according to the choice made by Member States, to: (a) undertakings employing at least 50 employees in any one Member State, or (b) establishments employing at least 20 employees in any one Member State; whereas Member States shall determine the method for calculating the thresholds of employees employed. See, Art 3 of Directive 2002/14/EC.

[201] See, J S Mill, '*Principles of Political Economy'* (7th edn 1909) Book V, ch IX, 7-10.

[202] See further L Hannah *'Inventing Retirement: The Development of Occupational Pensions in* Britain' (CUP 1986).

desirable, but individuals may be allowed to 'opt out' if they choose.[203] They quoted the example of the Swedish Privatization Plan, a 'pro-choice' plan of social security which allowed participants at almost every stage to opt-out from the default settings. As the savings of those who decided to stick to the default fund was significantly higher, this model is considered by the authors as an important lesson to learn about the limitations of freedom of choice. According to Thaler and Sunstein, one of the strongest conclusions to be drawn from the Swedish example is that default rules can save on transaction costs, by anticipating what most parties could and should reasonably expect in standardised types of bargains. If people are bias toward the *status quo*, default rules in the right place correct a significant market failure because it saves on transaction costs. But also, the option of opting-out acknowledges that private parties may legitimately want something else. [204]

Whereas the default setting with opting-out options could be justified in many areas of labour law, I argue that it is not suitable to facilitate employee involvement. A well written template contract of employment, or a model union constitution could promote understanding and best practice. As with company legislation, the parties would be free to agree to their own rules so long as the minimum rights were complied with. A 'nudge' would be a complement for compulsory minimum standards.

But when one applies the same scheme to works councils, the conclusions of the series of experiments conducted by Ariely *et al*. should be remembered. Whereas the output of 'Acknowledged' participants was much better, there were no significant differences recorded between the results of the 'Ignored' and of the 'Shredded' groups. Also, it was underlined in the Howthrone-experiment as well, that *genuine* participation generated the better productivity. Only by setting up and operating works councils may facilitate information and consultation at a workplace, it would not be guaranteed that employees could exercise their right to participate.

A research conducted by experts of SEEurope[205] on disclosure of information by European Companies in 2012 showed that companies in which reporting to employees or to their representatives exceeds the legal minimum are scarce. It was shown that access to non-financial data has remained a managerial prerogative throughout the EU. In addition, it was found that workforce and workplace conditions are not seen as a key part of sustainability by the management. In the field of codetermination on working conditions less than 10 per cent of the companies provided even partial information. Items going beyond the workplace, including issues related to sustainability were not reported at all.[206]

At the companies examined, sustainability was clearly linked to the corporate social responsibility (CSR) policies and non-financial reporting was often treated as a PR tool to develop this responsibility. However, even in this sense, these tools were mostly used to fulfil

---

[203]The concept of 'nudge' or 'choice architecture' is about what to do once it is decided that there is no market failure to warrant changes of mandatory rules, and this seems to be most of the time; see, R Thaler and C Sunstein '*Nudge: Improving Decisions about Health, Wealth and Happiness'* (2008).

[204] Thaler and Sustein (2008), 145-156.

[205] The SEEurope Network – organized by the European Trade Union Institute – was founded in 2003 to observe the transposition of the SE legislation and its practical impact on businesses and industrial relations. The network involves legal, economic and industrial relations experts from the European Economic Area (EU member states plus Norway, Iceland and Lichtenstein). Over the years the network has produced a broad range of publications, including country reports, case studies and topical reports.

[206] Cremers 2013:22

the needs of shareholders and less focused on those of the employees. Particularly in Greece and Bulgaria it was found that even those companies who have voluntary put on international reporting obligations are reluctant to disclose information related to environmental issues, health and safety matters at work, business strategy and marketing. The recent financial crisis has brought another aspect to non-financial reporting: European Companies tend to increasingly consider CSR and sustainability as a 'luxury' in times when elements of traditional social dialogue are in stake. Parallel to this phenomenon, they show significantly less respect for human rights, labour standards and environmental consciousness.

In my views, the above research underlines the importance of genuine employee participation over the role of compulsory workplace settings. The mere obligation to provide information on pre-set matters and consult employee representatives does not create dialogue. By creating dummy institutions to put a rubber stamp on employers' decisions could simultaneously be a pretext for abolishing basic labour or human rights. But the obligation to protect the right of participation cannot be vested solely to the state actor or the employer. Genuine participation also requires the duty of understanding of the importance of involvement and of activity on the employees' side.

VI Employee Involvement during the Economic Crisis in the European Union

After reviewing some of the theories arguing for the positive correlation between economic development and involvement in decision making processes now I turn to the practical evaluation of participation in workplaces. As it was discussed above, the positive effect of employee involvement has been heavily contested.

While the theoretical discussion has been going on for many decades, the economic crisis has provided a solid reference point for researchers to study the interrelatedness of firms' performance and the different forms of social dialogue from 2007 onwards. Though the negative consequences of an economic turmoil typically reach the labour market with delay, this time the effects were almost immediately visible, forcing social partners to act quickly. Despite the fact that the crisis was described as an 'omnipresent phantom in the autonomous European inter-professional social dialogue,'[207] the various forms of social dialogue at national, sectoral and company level have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis.[208]

[207] S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), 75.
[208] Cluwaert, I Schömann, 'European social dialogue and transnational framework agreements as a response to crisis?' (2011) 4 ETUI Policy Brief.

Many researches have been conducted since the outbreak of the economic crises.[209] I selected four recent studies examining the performance of companies during the crisis, conducted by the ILO and stakeholders.[210] These studies were selected on the basis of their approach towards the issue of employee involvement. The European Commission conducted a 'Fitness Check' on the effectiveness of the information and consultation right of employees in the EU. However, problems highlighted by stakeholders, were considered as "insignificant" by the report.[211] Selecting the studies, I wanted to get a better insight on stakeholders' view, and also looked into surveys which have not been frequently analysed. Also, I considered ILO's view unbiased on the issue.

Whereas the differences in methodology and scope make it impossible to fully compare their findings, it is unquestioned by their findings that social dialogue in general and enterprise level dialogue in particular has had measurable positive effect in combating the detrimental impacts of the crisis and it was positively associated with better social performance by companies. Most recently, Segol *et al*. argue that a sustainability analysis of large European companies listed on the stock market in 2012 demonstrated that in almost all cases companies with employee representation performed better than those without.[212]

Triomphe *et al.* and Glassner and Galgóczy emphasise the importance of plant-level negotiations over sectoral or national level social dialogue. Plant-level bargaining was found to be relatively free from the often politicized negotiations between trade unions and employers' associations or governments.[213] Triomphe *et al*. as well as Segol *et al*. put a special emphasis on the role played by European Works Councils (EWC). Whereas EWCs are important elements of transnational social dialogue[214] at company level, and in some cases[215] stimulating results were delivered by them, there are important limitations on the scope of their actions which need to be highlighted. Triomph *et al.* stress the ineffectiveness of instruments of EWCs in forcing employers to provide sufficient information in a timely manner and the slowness of EWCs responses in the decision-making process. Segol *et al.*

---

[209] See for exampleGlassner and Keune (ILO, 2010), '*Negotiating the Crisis'* ; Eurofund (2012) '*Social Dialogue in times of economic crisis*'; Eurofund (2012) '*Workplace social dialogue in Europe'*. The results of these surveys were taken into consideration in the drawing up of the 'Fitness Check' ;see, SWD (2013) 293 final, 19.

[210] C E Triomphe, R Guyet and D Tarren, '*Social Dialogue in Times of Global Economic Crises'* (Eurofund, 2010), V Glasner and B Galgóczy, '*Plant-level responses to the economic crisis in Europe'* (ETUI-REHS, 2009), I Guardiancich (ed) '*Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia'* (ILO (EC), 2010); B Segol, M Jepsen and P Pochet (eds) '*Benchmarking Working Europe 2014*' (ETUI-ETUC, 2014,).

[211] SWD (2013) 293 final, 13.

[212] Companies' performances related to environmental protection was also much more positive at those which had any forms of employee involvement. Thus, they suggest, strengthening of employee involvement could also significantly contribute to companies' sustainability. See, Segol *et al.* supra 110.

[213] Triomph *et al.* supra 10.

[214] Social dialogue is a very ambiguous term in literature, especially in the rhetoric of the European Commission (http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/socialdialogue.htm) (for the criticism of that vague understanding of the term see, B Keller and B Sörries in Bob Hepple '*Labour Laws and Global Trade*' (Hart Publishing, 2005), Chapter 9.). In this article I use this term in accordance with the ILO definition, meaning that '*social dialogue includes all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers on issues of common interest relating to economic and social policy*.'

[215] Schering Plough, Deutsche Post, DHL, ThyssenKrupp, Hewlett Packard and EDS; see, Triomphe *et al*. supra 7.

warn that the information and consultation rights of EWCs are often not respected. Moreover, the situation has worsened as the recent labour law reforms triggered by the crisis undermine workers' rights across Europe to information and consultation, especially during collective redundancy and transfer procedures. [216] Continued deregulation not only constitutes a backward step in workers' protection, but "undermines any remaining hopes of European social integration." [217]

All of the quoted studies point out a major difference between the factors hindering the institutional, political and legal framework of social dialogue in the old and the new Member States. It is clear that most new Member States experienced severe external pressures to restructure their public finances, as the Council of the European Union issued several Excessive Deficit Procedures[218] and the pressure on the governments' side to meet austerity plans often overrode the demands of organized labour. Hence, CEE countries did not only experience political instability like their Western counterparts, but also abrupt changes in social partnership that coincided with the fiscal consolidation measures in the region. However, the ILO study states that, despite the unconstructive circumstances, social dialogue was still used as a debate forum by all of the countries under examination, with the exception of the atypical cases of Romania and Hungary where social dialogue technically broke down.

Social dialogue, as the ILO study argues further, has been able to function and forge adequate responses to the crisis through national social pacts and collective agreements at various levels, except in cases where these forums have been prevalently overridden by governmental unilateralism, as happened in those Western and Eastern European countries most affected by the economic, debt and political crises (such as Ireland, Greece, Spain, Hungary and Romania). The countries examined in his research demonstrate diversity both institutionally and socio-economically. The ILO study demonstrates that the crisis exerted the worst impact on Slovenia, which entered a double-dip recession in 2012, but was almost entirely avoided by Poland. In both of these dimensions, the Czech Republic and Bulgaria are considered intermediate cases.

It is important to emphasise that all studies point out the weaker possibilities for employees to enjoy participatory rights at small and medium size companies[219] (SME).[220]

---

[216] For example in Spain and France the time given to EWCs for consultation in case of collective redundancy was drastically cut back, whereas in UK the consultancy period for transfer of undertakings was changed to its detriment. See, Segol *et al*. supra, 93.

[217] Segol *et al* supra, 68.

[218] The excessive deficit procedure is governed by Article 126 of the Treaty on the Functioning of the European Union, under which the Member States are obliged to avoid excessive deficits in national budgets. When the Council decides that an excessive deficit exists in a Member State, it firstly makes recommendations to the State concerned, with a view to rectifying the situation within a given period. If the Member State fails to comply with these recommendations, the Council may instruct it to take appropriate measures for reducing the deficit. If necessary, the Council has the option of imposing penalties or fines and of inviting the European Investment Bank (EIB) to reconsider its lending policy towards the Member State concerned.

[219] The EU uses two main factors to determined whether an enterprises falls into the category of SME : the number of employees and the either the turnover or the balance sheet total; for the threshold see, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm

[220] Ales argues that the right to information could be seen as an individual right, in the sense that it should be unconditionally enjoyed by every employee (see, Ales supra, 13). Critical on this view, B Bercusson *'The European Social Model Comes to Britain'* (2002) ILJ 209-44. Csilla Kollonay Lehoczky argues that the limitation (or even exclusion) of small employers is justified on the grounds that the formal mechanisms of information and consultation would mean a disproportionate financial burden on SMEs, and that the attributes of

SMEs employ between half and two-thirds of the total working force of the EU,[221] yet institutionalised forms of employee involvement are not common in these companies. On the other hand, it would be difficult to argue that employees working for SMEs are not entitled to equal level of information compared to those working for large multinational corporations (MNC), or that they do not deserve to be consulted. While at small companies the more informal relationship between employees and employer makes it easier to exercise the right of information and consultation, the argument that establishing information and consultation processes at medium sized companies would put too much burden on employers have to be treated with caution. As it was demonstrated above, weaker involvement results in weaker protection level, leading to discrimination between employees based on the size of their employer.[222]

The growing inequalities in incomes and the rising shares of populations at risk of poverty or social exclusion[223] demonstrate that austerity measures signify a roll-back of national social protection. Deregulation – rooted in the European Union's liberal approach to social legislation and becoming a part of the European governance process – affected individual and collective labour law in all member states. Despite the restricted rights in the arena of collective labour law and strategies pursued by multinational companies to challenge employee representatives to coordinate their activities across borders, the different forms of employee involvement have demonstrated significant contributions in mitigating the negative effects of the crisis. Thus, it is time for the European Union to rewind its current practice and make regulations concerning information and consultation rights more coherent, enforceable and inclusive for SMEs.

VII Democracy, Freedom and Development

In this section I summarise the common elements in the theories of Hugo Sinzheimer and Amartya Sen related to human dignity, democracy and participation. Though their background and respective eras of living are quite different – regarding the topic, the most important writings of Sinzheimer, a German lawyer and academic, pioneering in the field of labour law, were connected to the Weimar Republic and the creation of its Constitution,[224] whereas Sen, an economist who was brought up in the times of partition in India and has

---

small workplaces provides smooth access to information for employees without establishing special procedures (see, The Fundamental Right of Workers to Information and Consultation under the European Social Charter, in F Dorssement and T Blanke (eds), *The Recast of the European Works Council Directive* (Antwerp, 2009, Intersentia) 15).

[221] Eurostat 2014.

[222] For a detailed analyses on employee involvement at SMEs, see, A Wilkinson, T Dundon and I Grugulis (2007) '*Information but not consultation: exploring employee involvement in SMEs' 18* Int. J. of Human Resource Management 7.

[223] Eurostat 2014.

[224] Sinzheimer's career was painfully abrupted in 1933, when he was forced to emigrate to the Netherlands. In 1940 he was captured and taken to a concentration camp. After his release he was forced to retreat into hiding underneath a friend's roof in the Netherlands. He died shortly after the liberation of the Netherlands in 1945.

spent most of his working life in USA, elaborated his ideas on development and freedom around the 1980-90s and was subsequently awarded the Nobel Prize for Economics in 1998 – their work has, at least in my view, many points in common. Human dignity for Sinzheimer and human capabilities for Sen are special values which allow individuals freedom from subordination or deprivation and to live meaningful lives. To achieve such freedom both theorists emphasise the role of participation; in other words, involvement in decision-making on matters affecting one's life. Participation is only possible in democratic surroundings and the state has an indispensable role to safeguard democratic settings.

The significance of democracy appears central to the theories of both Sinzheimer and Sen. A further common element is the distinction between political, social and economic democracies. Sinzheimer compared economic democracy to political democracy and noted that they are similar in the sense that they both guarantee freedom to individuals *vis-á-vis* power (capital), and they both enable individuals to participate in the creation of a common will.[225] In Sinzheimer's views, economic democracy has two complementary pillars: the autonomous regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy.[226]

In the workplace, this participation is crucial for employees to be freed from the unilateral and often exploitative will of employers. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties.[227] On a Kantian recognition of human dignity,[228] Sinzheimer argues that the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations.[229]

Sen, challenging the "Lee Thesis",[230] asks the question of what should be more urgent for policy makers: to eradicate poverty, or to guarantee democratic rights (for which poor people have little use anyway)? Sen's answer to this question is very straightforward: economic development and liberty are interconnected. Separating them or prioritizing one over the other is entirely the wrong approach. Without freedom, including the opportunity to participate in decision-making on matters affecting the main areas of an individual's life there is no economic development. Likewise, economic development fosters individual and social freedom.

---

[225] Hugo Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (1976), quoted by Ruth Dukes '*Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the role of Labour Law*'(2008) 35 Journal of Law and Society 3, 346.

[226] Hugo Sinzheimer, *Eine Theorie des Sozialen Rechts (1936) XIV Zeitschrift für öffentliches Recht*, quoted by Ruth Dukes supra 347, see also Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law*, (2012-2013) 34 Comp. Lab. L& Pol'y J, 608.

[227] Dukes, supra 346.

[228] Kant has phrased the principle of human dignity in the archetypal maxim that what possesses dignity must not be treated purely as a mean but also as an end in itself; for more on Kant's approach to human dignity see, O Höffe 'Kant's innate right as a rational criterion for Human Rights' in L Denis (ed) *Kant's Metaphysics of morals: a critical guide* (Cambridge, 2010, CUP), 71 ff.

[229] Dukes, supra 345.

[230] Sen argues against the 'Lee Thesis', named for President Lee Kuan Yew of Singapore, which states that denying political and civil rights is acceptable if it promotes economic development and the general wealth of the population (Sen, 1999:15). He rightly insists that we should approach political freedoms and civil rights not through the means of eventually achieving them (GDP growth) but as a direct good in their own right. Freedom is also good because it creates growth. See, O'Hearn 'Amartya Sen's Development

While the interconnectedness of the different types of democracies is unquestioned by the authors, there is an important difference in their views: the role of economic democracy.[231] While Sinzheimer treats economic democracy as a supplement to political democracy, Sen argues that political liberty and civil freedoms are directly important on their own and no further justification is needed for their existence in terms of their positive effects on the economy.[232] In his view, the loss of freedom in the absence of employment choice or in a tyrannical form of work can itself constitute a form of deprivation.[233] Human capability stands centrally in Sen's theory. It refers to the substantive freedom of people to lead lives which they have reason to value and to enhance the real choices they have.

To explore further the connection points between participation, freedom and economic development, I look into details of the above theories regarding the role of state control and capital, and the value of individual freedom and human dignity for society.

A The Role of Law

As it was discussed above, according to Sinzheimer, an economic constitution (*Wirtschaftsverfassung*) could put labour in equal power position to capital (property) by enabling labour to make decisions together with property. However, for Sinzheimer the role of law was twofold: to facilitate the autonomous regulation of the economy and the workplace as one of its elements, and also to set limits on its processes.[234] Although Sinzheimer emphasized the importance of autonomous law,[235] he argued that the economic field should not be entirely freed from state control and that the state should be allowed to create norms whenever it is necessary.[236] State control would ensure the protection of workers from the 'untrammelled jurisdiction of the employer and even from the control of the worker himself.'[237] Thus, in Sinzheimer views, labour law could serve as a tool to free workers from the abuses of employer power and thereby contribute to the democratization of the economy.

Sen argues that the significance of democracy is in three distinct virtues, one of which is the constructive role of democracy in the sense that it creates values and norms. In his opinion it is crucial to safeguard the conditions and circumstances that contribute to the reach of economic processes.[238]

---

[231] A Sen, Development as Freedom (Oxford, 1999, OUP), 3, 16. (n 13), 147.
[232] Sen (1999) 3, 16.
[233] Sen (1999), 113.
[234] M Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law*, 34 Comp. Lab. L.& Pol'y J. 605 2012-2013, 607.
[235] O Kahn-Freund, *Hugo Sinzheimer,* in Lewis and Clarke, quoted by Dukes supra 347; see also R Dukes 'Hugo Sinzheimer and Constitutional Function of Labour Law' in G Davidov and B Langille (eds) ' *The Idea of Labour Law'* (Oxford, 2011, OUP).
[236] H Sinzheimer, *Das Ratesystem* (1919), quoted by Dukes supra 348.
[237] H Sinzheimer '*The Development of Labour Legislation in Germany'* (1920) 92 Annals of the American Academy of Political and Social Science, Social and Industrial Conditions in the Germany of Today, 35.
[238] A Sen (1999) 158.

A shared point for both Sinzheimer and Sen is the important, yet not exclusive, role of material wealth; they both consider it as a means and not as a purpose of achieving individual or organizational goals. While on one hand, Sinzheimer acknowledged the importance of capital as the material basis of life, on the other hand he considered it as a means to serve humans. Therefore, he denied that capital provides the employers' unlimited power over employees and argued that whereas the employers' right to command workers at a workplace is inherent in the notion of capital, it is important to identify the limits of the power arising from private property.[239] Sen also recognizes the importance of GNP growth and the increment of one's income as means to expanding individual freedom. However, he also emphasizes that other determinants, like social and economic arrangements, are also necessary for freedom, and that the removal of poverty, tyranny, poor economic opportunities and intolerance is inevitable for development.

B Individuals and Society

For Sinzheimer, employees constitute an important part of the society as a whole. In his work he points out that workers serve their employers directly, but the society indirectly; thus, the society owes an equivalent return for their services. The equivalent return is protection in the employment relationship.[240] For him, protecting individual employees is of essential importance with regard to the society, as the 'working power of man is not only an individual but also a social asset.'[241] In seeing development as freedom, Sen argues that the role of social support and public regulation also has to be considered. For Sen, it is important to recognize individual freedom as a social commitment, as he sees it, individual freedom quintessentially as a social product. He demonstrates the possible contributions of various societal institutions to improve and safeguard the substantive freedoms of individuals. And as a return to society, he argues, by exercising individual freedom, people contribute to development rather than being mere passive recipients of social benefits.[242]

[239] H Sinzheimer, *Grundzuge des Arbeitsrechts* (1927), quoted by R Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law* (2008) 35 Journal of Law and Society 3, 346.
[240] H Sinzheimer, The Development of Labour Legislation in Germany,
[241] Ibid.
[242] A Sen, (1999) xii, 31.

Chapter 3
Employee Involvement as a Human Right Issue in Europe

Robert Dahl argues that "people involved in [certain kind of human] association possess a right, an inalienable right to govern themselves in democratic process."[243] It is also argued that if democratic decision making is required in state level, then it is also justifiable at workplace level. The voice of workers is traditionally represented by trade unions.[244] The right to be involved in issues related to the workplace gained recognition much later and its gradual and partial acknowledgement is still much dependent on political regimes. Even though it was already realized after the First World War that economic prosperity and social democracy cannot be achieved without the protection of the dignity of the workers[245], employee involvement was only incorporated in human rights instruments in the late 1980s, and notably, only in European human rights instruments.[246] The controversy about the acknowledgement of labour rights as human rights is even more palpable regarding the right to be involved in decision making at the workplace. This chapter first analyses the paradox of labour rights as human rights in general, and then reviews the existing hard and soft law instruments concerning the right of employee involvement.

I Human Rights Nature of Labour Rights

Features of the globalized economy have several adverse effects on working conditions, economic standards and collective rights. The new trends also highlighted that working conditions and patterns of economic and social conditions are highly interdependent. Thus, need for better protection of the workers has emerged in the past decades. Even though workers' rights are acknowledged as human rights and appear in all major human rights instruments, relatively little attention has been devoted to them compared to the forces of globalization.[247]

---

[243] Robert Dahl, Preface to Economic Democracy, University of California Press, 1985
[244] Alan Bogg and Tonia Novitz, 'Investigating Voice at Work' (201-2012) 33 Comparative Labour Law and Policy Journal, 323.
[245] Hugo Sinzheimer, Grundzuge des Arbeitsrechts (1927).
[246] The three human rights instruments that provide for the right to involvement are the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers and the European Charter of Fundamental Rights.
[247] P. Alston (ed.) *Labour Rights as Human Rights* (OUP, 2005).

It is argued that "advocates of human rights and labour rights 'run on tracks that are sometimes parallel and rarely meet."[248] The paradox is rooted in the different purposes and personal scope of the legal fields. While human rights are primarily oriented toward limiting the power of the state, labour rights are predominantly aiming to limit the power of private actors in the market. Regarding human rights, the principal right-holders are individuals while labour rights are more collectively orientated. As oppose to human rights, which are universal and possessed by all human beings by virtue of their humanity, the entitlement in case of labour rights can be defined as the set of rights that humans possess by virtue of their status as workers.[249] However, this status is rather fluid and the identity of the beneficiaries of labour rights is contested.

A Collectives as Right-holders

According to Alexy, normative questions can be divided into ethical and legal-doctrinal questions. The former one would address why individuals have rights and which right they have; the latter one would deal with the question whether a legal subject has particular rights within a legal system.[250] In the first case there is no doubt whether the legal system acknowledges a certain right, but whether the norm that stipulates it is applicable to a given individual. In the second case the existence of the right in question is also doubtful.

Regarding Alexy's fist preoccupation, the personal scope of the right to involvement requires a closer inspection. The beneficiaries of the participatory rights are the employees (in plural). The human rights instruments providing for the right to involvement also stipulate that employees are those who are recognized as such under the national legislations or practices of the member states or contracting parties. In this regulatory technique there are two questions of interest. One is whether employee involvement is an individual or a collective right; the other one is whether the vague personal scope affects the level of protection the legal instruments could provide.

The scope of right-holders forms an essential element of collective right theories.[251] Whereas the theories themselves vary greatly, it seems to be that a consensus is reached regarding the defining criteria for collective right: the ultimate interest that the right serves, and the nature of the right-holder.[252] With other words, when a collective right is repelled, in any case it is the group, rather than any particular individual, who is wronged.

On the other hand, it is a striking question whether the group of employees employed by an undertaking is the same in nature as other collectives subject to collective rights, for example trade union members? Trade unions are legal entities with representatives, they usually have a solid internal structure and registered membership. Thus, both the trade union

---

[248] V. A. Leary, *The Paradox of Workers' Rights as Human Rights*, in Human Rights, Labor Rights and International Trade, L. A. Compa and S. F. Diamond (eds) (University of Pennsylvania Press, 2003), 22.
[249] K Kolben '*Labour Rights are Human Rights?*' (2010) 50 Virginia Journal of International Law 2, 449.
[250] Alexy, *A Theory of Constitutional Rights*, 111-15.
[251] See for example Hart, McCormick, Várady or Raz.
[252] Miodrag (2012), 119.

and its members could easily be identified as right holder. The collective of employees on the other hand is a part of the undertaking, it lacks internal structure as they position within the undertaking is defined by the unilateral decision of the employer; and the group has no influence on its membership either. Moreover, individuals could perform work in great many ways for an undertaking. Due to its diverse nature, even in state socialist legal theories, the idea that the collective of employees has a special legal nature could not find solid support.[253]

Of course, not all collectives could be defined by regulated admissions or membership fees, such as ethnic minorities. On the other hand, the collective of employees is different from these groups; as oppose to ethnic minorities, it is unlikely that the membership plays a constitutive role in the members' life in terms of adopted values and life perspectives.[254] Also, while social recognition is necessary for the membership of these groups,[255] it is not required for employees, as their 'membership card' is provided by the contract based on which they perform work for the employer. Another striking difference is that while the cessation of the 'membership' in collectives pretty much depends on the decision of the right-holder, employment could be terminated by the unilateral (and often arbitrary) decision of the employer.

B Employee Involvement as a Human Right

Regarding the latter presumption of Alexy, the human right nature of employee involvement has long been questioned. The 'older brother' of participatory rights, the right to bargain collectively gained recognition in a much less contested way and now is acknowledged by most major human rights instruments.[256] To the contrary, employee involvement first appeared in 1988 in the Additional Protocol to the European Social Charter.[257] A year later, the Community Charter of Fundamental Social Rights of Workers also incorporated it,[258] and subsequently it appeared in the Charter of Fundamental Rights of European Union. However, the right to involvement does not appear in human rights instruments outside of the aegis of Europe. The low recognition could raise concerns whether the right to involvement is a fully fledged human right, however, both the European Social Charter and the Charter of Fundamental Rights of the EU are indispensable human rights instruments of the European region and their importance is unquestioned.

The European Social Charter is a human right convention of the Council of Europe, which establish a wide range of economic and social rights that are crucial for human dignity.

---

[253] See for example the Eörsi-Weltner argument.
[254] Otto von Gierke, argued for the organic theory of juristic persons as right-holders; see, Otto von Gierke 'Die Genossenschaftstheorie und die deutsche Rechtsprechung' (Berlin, 1887), Chapter 1.
[255] See Alexy, supra.
[256] For example, International Covenant on Civil and Political Rights , International Covenant on Economic, Social and Cultural Rights, Right to Organise and Collective Bargaining Convention, 1949 (No 98).
[257] The Additional Protocol came into force in 1992.
[258] Community Charter of Fundamental Social Rights of Workers (1989), Arts 17-18.

Due to its wide geographic coverage, its role is indispensable in promoting human rights across the European continent. The CFREU addresses issues which form the core of labour law and industrial relations in Europe: freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30). Following the entry into force of the Lisbon Treaty in 2009 the CFREU has the same legal value as the European Union treaties. Thus, inclusion of the right to information and consultation in this instrument signifies the stance of employee involvement as a fundamental human right. However, the question whether it is an individual or a collective right has to be addressed.

The right holders regarding employee involvement needs attention. Article 27 of CFREU states that "workers or their representatives" must be informed and consulted. Thus, where no representative could be found on an appropriate level, then workers, either individually or as a group, have to directly informed or consulted. Neither the right to be represented, nor the duty to establish a standing body can be found in Article 27. That means the right to information and consultation is vested in individuals, who, when the circumstances require so, could form a representative body for themselves. However, the possibility to elect a standing consultative body does not affect the individual nature of employee involvement as a human right. Thus, the right to information and consultation should be unconditionally enjoyed by every employee, with a possibility to exercise it with the assistance of a competent and standing representative body.

The right to information and consultation is special from another aspect as well. Whereas information and consultation is a right must be guaranteed to employees, in fact, as Ales points it out, it rather represents a duty for an employer to provide this right. Thus, as the very core of the right, it requires an employer to be active in delivering information and consultation.[259]

II Employee Involvement in the International Labour Organization Norms

The term 'workers' participation' as used by the ILO could be seen participation in decision-making at the enterprise level. The Philadelphia Declaration (now an Annex to the Constitution of the ILO) calls on the ILO to draw up programs to promote 'the cooperation of

[259] E Ales, Information and Consultation within the Undertaking: Employees Right or Employers' Duty? Looking for effectiveness' in, Blanke et al. (eds), 7.

management and labour in the continuous improvement of productive efficiency'. [260] To implement this call, the ILO has created series of general principles. However, no convention has been adopted on information-consultation; thus, the Organisation uses soft law instruments. The normative framework of the ILO on information and consultation contains recommendations and declarations – measures which do not have the binding force of the conventions and are not subject to state ratification.

A Recommendations

The ILO addressed the issue of information and consultation in numerous recommendations. Recommendation Number 94 (1952) on Cooperation at the Level of the Undertaking indicates that it is necessary to promote the consultation and collaboration between employers and workers at company level for issues of common interest which are not covered by collective bargaining or which are not normally the subject of other procedures which establish working conditions. Recommendation Number 113 (1960) on Consultation (Industrial and National Levels recommends appropriate measures for efficient consultation and collaboration to promote a mutual understanding and good relations, to develop the economy, to improve working conditions and to raise the standards of living. Recommendation Number 143 (1971) on the Workers' Representatives affirms the need of a consultation, before the dismissal of a workers' representative becomes final. [261] Recommendation Number 129 on the Communications within the Undertaking (1967) is even more explicit on the rights and obligations of social partners concerned by the restructuring and the rules which are supposed to guide the information-consultation process. It indicates the necessity of ensuring a climate of comprehension and reciprocal trust at company level, as well as the importance of timely communication and consultation.[262] The recommendation also lists a whole series of themes to be included in information-consultation process at company level, and especially concerning working conditions (like hire, transfer or termination). The overall situation of the company and the explanation of decisions which directly or indirectly affect the situation of the personnel are also addressed by the document.

The question of information-consultation is better clarified in one of the chapters of Convention Number 158 (1982) (accompanied by Recommendation No 166) on redundancies. This document deals specifically with the matter of economic, technological, structural or similar redundancies. In the event of such cases, the recommendation specifies that the employer should provide the concerned workers' representatives, in good time, with all relevant information, including the reasons behind the envisaged redundancies, the number

[260] III. e
[261] It is important to note that the duty of consultation is intended to coexist with collective bargaining, not to replace it.
[262] Eg, before the decision is made by the management.

and the categories of workers likely to be affected and the period over which these are expected to be implemented, in order to limit the negative effects of the action.

B Declarations

Declarations are resolutions of the International Labour Conference used to make formal and authoritative statements. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States.

Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work is a commitment by governments, employers' and workers' organizations to uphold basic human values. The Declaration covers four fundamental principles and rights at work, one of which is freedom of association and the effective recognition of the right to collective bargaining.[263] The Declaration and its Follow-up provides three ways to help countries, employers and workers achieve full realisation of the Declaration's objective. Firstly, there is an Annual Review composed of reports from countries that have not yet ratified one or more of the ILO Conventions that directly relate to the specific principles and rights stated in the Declaration. This reporting process provides governments with an opportunity to state what measures they have taken towards achieving respect for the Declaration. It also gives organizations of employers and workers a chance to express their views on the progress made. Secondly, each year a Global Report provides a dynamic and objective worldwide picture on the current situation of the principles and rights expressed in the Declaration. It serves as a basis for determining priorities for technical cooperation. Technical cooperation projects are designed to address identifiable needs in relation to the Declaration and to strengthen local capacities thereby translating principles into practice.

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)[264] offers guidelines to MNEs, governments, as well as to employers' and workers' organizations in areas of employment, training, conditions of work and life, and industrial relations. Its provisions are reinforced by certain ILO Conventions and Recommendations which the social partners are urged to bear in mind and apply, to the greatest extent possible. The MNE Declaration provides for no specific ways of monitoring. Even though ILO regularly collects data to monitor and analyse changes in actual working conditions and the laws which regulate them, such activity mostly contributes to identifying the gaps between law and actual conditions. It is a tool used to assist ILO in developing more effective policy responses. However, it does not aim to serve as an instrument to monitor the

[263] Other principles are: elimination of forced or compulsory work, abolition of child labour and elimination of discrimination in employment relations.
[264] Adopted by the Governing Body of ILO in 1977, amended at its 204th session in 2000 and at its 279th and 295th sessions in 2006.

actual employers' activity or support workers or workers' group with their individual complaints against the employer who fails to adhere to the instrument.

C Summary

Regarding the binding force of these measures it shall be noted that recommendations and declarations, do not have the binding force of the conventions and they are not subject to state ratification. Declarations and resolutions of the International Labour Conference used to make formal and authoritative statements. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings. However, none of them are capable of promoting employee involvement as an enforceable right. Despite the fact that the regulators are well respected supranational non-state actors, these soft law measures have no binding force, monitoring, or adjudication in the background, thus, these measures are not suitable to provide uniform protection to the right to information and consultation.

It is interesting to note that while the ILO did not adopt a convention on information and consultation within the undertaking, the revision of such standard setting has been reoccurring. In 2011 the Governing Body of ILO stated on its 312th session that in order to meet the challenges of globalization and rapidly changing markets, business are increasingly seek for adjustments at workplace which could accelerate their competitiveness.[265] According to the Governing Body it would be essential to provide standards meeting the new needs regarding social dialogue, thus, it is recommended to revisit ILO related recommendations, including Recommendation No. 129 on Communication within the Undertaking. It was suggested that the 2014 would be dealing with the matter; however, it was eventually not included in the agenda.

III The European Social Charter

The European Social Charter (ESC) is a human right convention of the Council of Europe, which establishes a wide range of economic and social rights that are indispensable for human dignity. Article 21 of ESC provides for the right to information and consultation, and Article 22 specifies the right to participation in determining working conditions.

The 1961 original text of European Social Charter did not contain regulations regarding employees' right to information and consultation. In 1988 the Additional Protocol however enlarged the scope *rationae materiae* of the Charter and added four new articles, among which the right to informed and consulted and the right to participation in determining of working conditions were incorporated. The personal scope of the Additional Protocol was

[265] See, GB.312/INS/2/, 6 ff.

exactly the same as the European Social Charter of 1961. The Revised European Social Charter of 1996 addressed a specific involvement issue, the right to information and consultation in the case of collective redundancies. The right to consultation is stipulated by Articles 6, 21, 26 and 29, while the right of co-determination is set forth by Article 22.

The following section will examine first the unspecified involvement rights of Article 21 and 22, and then the concrete involvement issue of Article 29 of the Revised European Social Charter.

A Unspecified Involvement Rights

The European Social Charter is a human right convention of the Council of Europe, which establishes a wide range of economic and social rights that are indispensable for human dignity. Due to the wide geographic coverage,[266] its role is indispensable in promoting human rights across the European continent.

Reflecting the substantive as well as the time-phase difference between the freedom to bargain collectively (guaranteed by Article 6)[267] on the one hand and the fundamental right to be involved in managerial decisions on the other, the latter was added later and now is regulated by Articles 21, 22 and 29 of the Revised Charter. Article 21 and 22 are in general on involvement while article 29 guarantees the right to information and consultation in the specific situation of collective redundancies.[268]

Article 21 provides for the right to information and consultation on the situation of the enterprise and on planned decisions with a potential impact to the employment situation. In order to make involvement meaningful, employees or their representatives have to be consulted in a good time on the proposed decisions[269].

Article 22 is not on the company situation, it is on working conditions and gives more: it provides for the right to "take part" in the determination and improvement of working conditions. Taking part in the protection of health and safety, in organizing social and cultural services as well as in the supervision of observation of all these is expressly mentioned. "Part-

[266] The 1961 ESC or its 1996 revised version has been ratified by 43 (10+33) out of the 47 Member States of the Council of Europe.

[267] Article 6, one of the most ratified, hard-core article of the ESC, requires States Parties, in its paragraph 1, to promote joint consultation between workers (or their representatives) and employers on all levels. This might create a misleading appearance of Art. 6(1) being relevant for this paper, however, it remains within the domain of "bargaining", distinct and separate from "involvement in managerial decisions". For more details on this distinction see Kollonay Lehoczky, supra, 6.

[268] Adopted in 1988, Article 2 of the Additional Protocol provided for the right to information and consultation and Article 3 regulated the right to take part in the determination and improvement of the working conditions and working environment. In the revised Charter of 1996 Article 2 of the Additional Protocol became Article 21, whereas Article 3 of the Additional Protocol appeared as Article 22. In the Revised Charter no changes have been made as to their substances.

[269] Article 21§b.

taking" in these activities evidently must mean more than mere information and consultation; however, "co-determination" is not required by the Charter.

Some of the features of Articles 21 and 22 are common, such as the legal framework and the personal scope.[270] Regarding the legal framework, under both articles the Contracting Parties undertake to promote the right to information and consultation by adopting or encouraging provisions that enables the involvement of the workers or their representatives in accordance with their national legislation and practice. The Explanatory Rules specify that these measures should be effective and adequate.[271] Neither Article 21 nor 22 requires the Contracting Parties to establish co-determination rights for the employees, even though the meaning of the expression of 'the right to take part' used for Article 22 is less elaborated. The notion suggests that under Article 22 a more active role should be given to employees' representatives with the aim of being engaged in a dialogue with the employer.

With regard to the personal scope, both Articles are applicable for undertakings operating for gain, therefore public servants and employees of public bodies are excluded from their scopes. The Charter enables the Contracting Parties to further exclude employees working for spiritual or ideological undertakings as well as for small-sized employers. In case of the exemption of small undertakings it is argued that the specific personal and material resources that are required to fulfil the provisions of information and consultation would mean a disproportionate burden for small enterprises. The Explanatory Report also provides an explanation of the notion of workers or their representatives, applicable for both Articles 21 and 22.[272] According to this specification, the right to information and consultation could be exercised either by trade union representatives or representatives freely elected or otherwise chosen by the employees of the given enterprise. There is no restriction on overlapping functions of employee representatives; they could be at the same time trade union officers too. While respecting the importance of autonomous regulations, the Committee repeatedly emphasises that the right to information and consultation ought not to be restricted only to workers who are covered by collective agreements.

i The Right to Information and Consultation (Article 21)

The European Social Charter renders Contracting Parties to adopt or encourage measures enabling workers to have access to certain information about their employer as well as to be consulted on matters related to their employment. Article 21 first specifies the right protected then allows the exclusion of certain enterprises from the scope of the provision. Under Paragraph 1 it is provided for that workers or their representatives, in accordance with the Contracting Parties national legislation or practice, have the right to be informed regularly or

[270] Cs. Lehoczky-Kollonay, *The Fundamental Right of Workers to Information and Consultation under the European Social Charter*, in The Recast of the European Works Council Directive, Dorssemont, Blanke (eds.), Intersentia, 2010; and P. Alston (ed.), Labour Rights as Human Rights, Oxford.
[271] Explanatory Report to the Additional Protocol, Para 35.
[272] Ibid, Para 29.

at appropriate time and in a comprehensive way about the economic and financial situation of the undertaking employing them.[273] Also, they have the right to be consulted in a good time on proposed decisions which could substantially affect their interest, particularly on those decisions which could have an important impact on their employment situation in the undertaking.[274]

It is important to see the difference between the provisions of sub-paragraphs a) and b) of Paragraph 1. Whereas sub-paragraph a) only provides for the mere (passive) right to receive the necessary information specified; sub-paragraph b. provides for the bilateral, therefore active process of consultation. Paragraph 1 also provides for special restrictions regarding confidential information stating that certain information which could be prejudicial to the undertaking may not be disclosed or subject to confidentiality.[275] Paragraph 2 of the Additional Protocol enabled Contracting Parties to exclude employers employing less than a certain number of employees from the scope of Paragraph 1 by national legislation or practice. This Paragraph was not incorporated to the body text of the Revised Charter, however, the Appendix upholds this possibility.[276]

The Appendix to the Charter[277] defines the term workers representatives as persons who are recognized as such under national legislation or practice. National legislation or practice has to be understood as the case may be, in addition to laws and regulations, collective agreements, other agreements between employers and workers' representatives, customs, as well as the relevant case law. An undertaking is defined as a set of tangible and intangible components, with or without legal personality, formed to produce or provide services for financial gain, and with power to determine its own market policy.

a Case-law on Employee Threshold

The Additional Protocol only entered into force in 1992, thus relevant case-law is not overly extensive. Article 7 of the Additional Protocol has already provided for that the requirements of Article 2 of the Additional Protocol are satisfied if great majority (80 per cent) of the workers is protected under its provisions. However, workers excluded in accordance with Paragraph 2 of Article 2 were not taken into account in establishing the threshold for workers concerned. This means that Article 2 of the Additional Protocol was only applicable to undertakings that pursuit financial gain. The 'great majority' rule has been upheld by Revised Charter with regard to both Articles 21 and 22.

Conformity to Article 21 was first examined in Cycle XIII-3.[278] In its conclusions the European Committee of Social Rights [279] (hereinafter the Committee) stated that only

[273] Additional Protocol to the ESC (1988), Article 2§1a; or Article 21 of the Revised European Social Charter (1996).
[274] Article 2§1b.
[275] Article 2§1a.
[276] Appendix, Para 6.
[277] Applicable for both Article 2 and 3 (Article 21 and 22 of the Revised ESC).
[278] Back then Article 2 of the additional Protocol.

employees in the public sector are in principle exempted from the provisions of Article 21, and in the public sector it is only applicable to workers, who are employed by publicly-owned enterprises. The most important aspect examined by the Committee has been whether the great majority of the workers are covered and benefited from the right to information and consultation. Other questions posed to Contracting Parties have included whether consultation covers all areas that Article 21 provided for, and whether workers or their representatives have the right to appeal in cases when the provisions of the article were breached.

Since 2007 the Committee while deciding on the conformity with Article 21 of the Charter has been referring to the minimum framework of Directive 2002/14/EC and to the seminal CGT judgment of the European Court of Justice.[280] Directive 2002/14/EC applies according to the choice made by Member States, to undertakings with at least 50 employees or establishments with at least 20 employees in any one EU Member State. Furthermore, when assessing compliance with Article 21,[281] the Committee considers in accordance with the CGT-case that all categories of employee regardless of their status, length of service or workplace must be taken into account when calculating the number of employees covered by the right to information and consultation.

Italy has been in non-conformity with the Charter regarding Article 21 since the XIV-2 revision cycle.[282] The Committee has been repeatedly asked for more information on the structures, procedures and arrangements of information and consultation processes and the nature of information given to workers.[283] Italy's report submitted for the XIX-3 revision Cycle stated that the rules and procedures for appointing and electing trade union representatives applicable to employees on permanent contracts also apply to those on fixed-term contracts, as long as the contract is for more than nine months. The Committee considered that the information given in the report on the proportion of employees entitled to be informed and consulted within their enterprise is not satisfactory. It therefore came to the conclusion that Italy is still not in conformity with the Revised Charter.

Regarding Croatia, in revision cycle XIX-3[284] the Committee asked questions in general on the scope of Croatia's legislation, and in particular on the calculation of these minimum thresholds. In its previous conclusion the Committee had asked for the estimated proportion of the labour force which enjoys the right to information and consultation. However, the report submitted to answer that question contained no information as to the question posed. Thus the Committee reiterated its question.[285] In its Conclusions, the Committee stated that the situation in Croatia is not in conformity with Article 21 on the ground that it has not been established that legal provisions governing the information and consultation of workers cover all categories of workers and all undertakings.[286]

---

[279] The 1995 Additional Protocol provides for the system of collective complaints. This new procedural mechanism allows trade unions, employers' organization and certain NGOs to refer alleged breaches of the charter to the European Committee of Social Rights (previously the Committee of Independent Experts).
[280] *Confédération générale du travail (CGT*) and Others, Case C-385/05
[281] Art 2 of the 1988 Additional Protocol of the Charter.
[282] Lasted from 1998 to 2000.
[283] Conclusions XIV-2, pp. 455-56.
[284] Revision period is form 01/01/2005 to 12/31/2008.
[285] See, Document ID 2010/def/HRV.
[286] Conclusions XIX-3.

With regard to Greece, the Committee concluded that the country's report fails to provide information regarding the proportion of workers out of the total workforce covered; the Committee therefore reiterated its question. The report described the role and functioning of the works council (Council of the Employees) and stated that the works council responsibilities regarding information and consultation of workers are exercised only if there is no trade union functioning in the enterprise and these issues were not subject of a collective labour agreement. In its previous conclusion the Committee held that trade unions thus had a monopoly on representing workers for the purpose of information and consultation. According to the Committee, it had the possibility that a works council representing a majority of non-unionised employees would be deprived of the right to be informed and consulted, while this right would be granted to a trade union representing only a minority of employees. The Committee further pointed out that despite the existence of legislation on works councils since 1988, very few works councils have actually been established in practice.[287]

Norway's case is quite particular. In Norway the right to information and consultation is mainly governed by collective agreements. In the private sector this right is embodied, *inter alia*, in the national collective agreement between the confederation of Norwegian business and industry (NHO) and the Norwegian trade union confederation (LO). In firms, this right is primarily vested in locally elected trade union representatives (shop stewards) but also in bipartite works councils, which must be established in enterprises with more than 100 employees. Works councils may also be established in smaller enterprises. Besides that, there are several basic private sector agreements that were very similar to the one between the NHO and the LO. The 2005 amend of the Work Environment Act also includes provisions similar to the LO-NHO "basic agreement" regarding employees' right to information and consultation within the enterprise. Other branch legislation includes specific provisions on this subject, such as the Joint Stock Company Act, which applies to all companies with more than 30 employees. The 2005 act requires employers to inform and consult employee representatives in enterprises with more than 50 employees. In 2004, around 250 000 workers in total were officially covered by a collective agreement. There were also approximately 600 collective agreements in the private sector at the same period. All workers, even if they are non-union members, can be covered by a collective agreement. This applies to workers at enterprises bound by a collective agreement. Based on case-law and agreement practice these enterprises are obliged to apply the agreement on unorganized employees in the enterprise comprised by the scope of the agreement. In addition, according to a survey conducted by Statistic Norway from 2004, 77 per cent states that they are covered by a collective agreement, including the non-union workers. The current report states that during the reference period, approximately 52 per cent of all workers in the private sector who are not covered by the LO-NHO "basic agreement" were though covered by a collective agreement. In total, 70 per cent of all workers in Norway were officially covered by a collective agreement during the same period, which means that despite the fact that social dialogue is quite advanced in Norway, the coverage still does not meet the 'great majority' requirement.

[287] Conclusions XIX-3; see, Document ID 2010/def/GRC.

b Case-law on Enforcement

The Committee asks the Contracting Parties what sort of remedies workers or workers' representatives has when their right to information and consultation under Article 21 of the Revised Charter has been infringed, particularly with regard to information considered by employers to be confidential. Enforcement methods usually contain the right to apply, either to court or arbitration, imposition of fines. The amount of the penalty is rather diverse, ranging from EUR 6.5[288] to EUR 50000.[289]

In rare cases national regulations provide for the nullity of the employer's decision violating the information and consultation processes. For example in Croatia a decision rendered by the employer contrary to the provisions of the Croatian Labour Code on consultations with the works council is null and void.

In case of Greece, with a decision of the Minister of Employment and Social Insurance, it is possible, after a justified proposal of the competent Labour Inspector, to impose on the employer a temporary pause of the operation for a time interval longer than three days or even a permanent pause of the operation of the particular productive procedure or of the department, or of the whole of the enterprise or undertaking.

In Moldova's case, the Committee found that the situation in Moldova is not in conformity with Article 21 of the Revised Charter on the ground that it has not been established that sanctions are applicable in case employers fail to fulfil their obligation to inform and consult workers within the undertaking.

ii The Right to Take Part in Determination of the Working Conditions and Working Environment (Article 22)

Article 22 has similar structure to Article 21. First it lists the areas in which participation has to take place, and then provides for the exclusion of certain undertakings. Under Paragraph 1 Contracting Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation or practices to contribute to the determination and the improvement of the working conditions, work organization and working environment; to the protection of health and safety within the undertaking; to the organization of social and socio-cultural services and facilities within the undertaking and to the supervision of the observance of regulations on the above measures. For example the Committee underlined in this context that the workers' right to take part in the determination and improvement of the working conditions and working environment implies that workers

[288] Estonia
[289] Greece

may contribute, to a certain extent, to the employer's decision making process.[290] Paragraph 2 allows Contracting Parties to exclude undertaking under a certain size regarding the number of employees. Appendix 3 clarifies the term social and socio-cultural services and facilities stating that it refers to facilities for workers provided by some undertakings such as welfare assistance, sports fields, rooms for nursing mothers, libraries, children's holiday camps and the like. Appendix 3 also sets it clear that Article 22 does not affect either the powers and obligations of the Contracting Parties regarding the adoption of health and safety regulations for work places, or the powers and responsibilities of the respective monitoring bodies.

A major difference between Articles 21 and 22 is that Article 22 applies to all undertakings, whether private or public.[291] The Committee in case of Croatia repeatedly asked how employee participation in the determination and improvement of working conditions and working environment takes place in undertakings of the public sector. Regarding working conditions, work organisation and working environment, the Committee regularly asks information on employee representation on company board too.

a Case-law on the Relation to Collective Bargaining

The most recent case-law related to Article 22 was related to the compliant of General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece.[292] GENOP-DEI and ADEDY challenged that the situation in Greece is not in conformity with Article 22 Para 1a on the grounds that Greek law[293] made it possible for a collective agreement at enterprise level to derogate from the provisions on remuneration and working conditions set out in a collective agreement concluded at branch level. It was argued that such regulation may encourage the systematic deterioration of working conditions, which is in breach of Article 22 Para 1a. The Committee of Ministers in their Resolution[294] concluded on non-application of Article 22 Para 1a.[295] The conclusions on collective bargaining of the report on the high-level mission to Greece[296] of the International Labour Organization (ILO) have been taken into account. However, it came to the conclusion that Article 22 in general and, in particular, paragraph 1a, does not concern the right to collective bargaining.

---

[290] Conclusions for Armenia, XIX-3.
[291] Revision cycle XIX-3, document ID 2010/def/HRV
[292] Complaint No. 65/2011.
[293] Section 13 of Act No. 3899 of 17 December 2010.
[294] Resolution CM/ResChS(2013)2.
[295] By 14 votes to 1.
[296] Athens, 19-23 September 2011

B Specific Rights for Information and Consultation

While Articles 21 and 22 provide for information and consultation right in general, Article 29 of the Revised Charter guarantees the right for all employees to be informed and consulted in collective redundancy processes. In this regard, information and consultation need to cover the ways and means of avoiding collective redundancies or limiting their occurrence and means of mitigating its negative effects.[297] The Contracting Parties could introduce accompanying social measures aiming to redeployment or retraining redundant workers to meet the requirement set forth by Article 29.

Though, according to the Explanatory Report the relevant EU Directives were examined in the drafting process, the term of collective redundancy is not specified by the Charter.[298] The Committee during the first conclusion cycle concerning Article 29 interpreted collective redundancy as a layoff affecting several workers within a period of set by the law and decided for reasons which have no relevance to the workers as individuals, but are related to a reduction or change in the operation of the undertaking.[299]

Unlike for Articles 21 and 22, the purpose of the consultation is provided for by Article 29. Also, it is required that sufficient dialogue should take place between the employer and the employees or their representatives with regard to the redundancy as well as to the mitigation of its effects. Thus, it is necessary for the employer to provide adequate preliminary information, including the reasons for redundancy, planned social measures, the order in which the redundancies will be made, the criteria for being made redundant. If such process is not taking place, the Committee concludes on the non-conformity.[300] This requirement also sheds light on the importance of the timing of the consultation. However, what qualifies as a 'good time' varies greatly among Contracting Parties from seven days to three months.[301] Also, public authorities have to be involved in the procedures, however their role – whether it is the mere information on the redundancies or involvement in the negotiations – is undefined.

IV Human Rights Instruments of the European Union

It has been long argued that the Europeanization of industrial relations plays an indispensable role in the strengthening and the further development of the social dimension of the European integration. As a part of the integration process, first the Community Charter of the Fundamental Social Rights of Workers (CCFSR) and subsequently the Charter of

[297] Also in the Explanatory Report, footnote 79.
[298] Explanatory Report, Para 109.
[299] Conclusions 2003 and 2005, Statement of Interpretation on Art 29.
[300] For example Moldova (Conclusions 2010) or Sweden (Conclusions 2007).
[301] Conclusions 2003.

Fundamental Rights of the European Union (CFREU) recognized the rights of workers to information and consultation. The approach of Articles 17 and 18 of CCFSR demonstrates the early regulatory techniques of the EU in the social field: specifying the issues in which workers are entitled to be informed and consulted, such as major technological changes, restructuring, collective redundancies.[302] CFREU demonstrates the shift away from this approach by referring to Community law and national laws and practices.[303] The new regulatory technique reflects better the very different legal, social and labour relations backgrounds of the Member States. Thus the paradigm shift indeed helped the EU to make a move and to push through long-standing proposals. The following section first provides an overview on the regulations of CCFSR, and then analysis the progress, or sometimes the retreat, the CFREU has achieved in the promotion of the right to information and consultation as a human right.

A The Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers was adopted in 1989 by all Member States except the United Kingdom. The Charter was seen as a political instrument containing "moral obligations" aiming to guarantee certain social rights in the countries concerned. The primarily scope of the Community Charter concerned the labour market, vocational training, social protection, equal opportunities and health and safety at work. The Charter was followed up by action programmes and specific legislative proposals. The CCFSR could be seen as the precursor of the Charter of Fundamental Rights regarding employee participation.

Article 17 of CCFSR stipulated that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. Article 17 underlined the transnational character of the involvement processes, stating that they had to apply especially in companies or groups of companies having establishments or companies in several Member States of the European Community. Article 18 prescribed that these processes must be implemented in due time, and listed specific cases which had to be treated with scrutiny, such as technological changes which, from the point of view of working conditions and work organisation, have major implications for the work force are introduced into undertakings; restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers; collective redundancy procedures; and finally, again in connection with the transnational importance of information and consultation, in situations when trans-frontier workers in

[302] Community Charter of Fundamental Social Rights of Workers (1989), Arts. 17-18.
[303] Charter of Fundamental Rights of the European Union (2000/C 364/01) Art. 27.

particular are affected by employment policies pursued by the undertaking where they are employed.

The Community Charter of 1989 only had declaratory status, however it is claimed that it had three effects which was expected to emerge for the EU Charter.[304] First, the Member States' stronger attachment to fundamental social rights as defined in the 1989 Community Charter, which appears in Article 151 of the TFEU (ex Article 136 of the TEC). Secondly, the Commission's Social Action Programme was directly linked to the declarations of the Community Charter. Finally, CFREU was expected to be used by the European Court of Justice as an interpretative guide in litigation concerning social rights.

Despite the high hopes attached to the CCFRS, the social policy dimension had not become a priority for the reform agenda,[305] which, as it was argued, endangered the enlargement of the EU and undermined institutional reforms. Therefore, the adoption of the CFREU had great importance regarding the social dimension of the EU, as fundamental labour and social standards are determined by the economic and political context which forms their content. Social and labour rights could be developed only when they find a place on the Community's integration agenda. Thus, the inclusion of social and economic rights related to working life into the CFREU confirms that these are to be considered fundamental to the EU social model, what it means to be an EU citizen. [306]

B The Charter of Fundamental Rights of the European Union

The Community Charter of the Fundamental Social Rights of Workers (CCFSR) had already stipulated that information, consultation and participation for workers must be developed alongside appropriate lines, taking account of the practices in force in the various Member States. These provisions can be considered a precursor of Article 27 of the Charter of Fundamental Rights of the Charter of the European Union (CFREU) The continuing significance of the institution is illustrated by the structure of CFREU: workers' right to information and consultation appears in the "Solidarity" chapter, preceding Article 28, on the "classic" right of collective bargaining and collective action.[307] The implication of this chapter is that the traditional individual and liberal rights, and the social rights, which create networks of solidarity among the citizens of the EU have fundamental importance for the European Union. Thus the right to information and consultation is a fundamental right in the context of the EU, and Article 27's reference to national laws and practices implies that the

[304] B. Bercusson (ed) 'European labour law and the EU Charter of Fundamental Rights' (Brussels, 2002, ETUI) 14.
[305] See, ICG 2000.
[306] Bercusson, supra, 27.
[307] While the literature is evidently more addressing Article 28, this might be considered evident in the light of the "contemporary" Laval and Viking decisions (see, C-341/05 Laval un Partneri [2007] ECR I-11767 and C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union [2007] ECR I-10779), however, the importance of the Article 27 rights is not-questioned. For a more detailed analysis see Silvana Sciarra '*Viking and Laval: Collective Labour Rights and Market Freedom in the Enlarged EU'* (2007-08) 10 Cambridge Yearbook of European Legal Studies, 563 ff.

Member States are obliged to maintain at least the mandatory standards of information and consultation provided by statutory law or by collective agreements.

Article 27 provides that "workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices."

On one hand, it is apparent from the phrasing of Article 27 that the employer has the obligation to inform and consult either the worker directly, or the worker's representatives. Providing direct information and consultation to individual workers could be considered an 'appropriate level' only in very small companies or establishments. Also, restricting the right for workers or their representatives to a right only for the individual workers would contradict the guarantee of the freedom of association in Article 12 of CFREU. On the other hand, the view that the guarantee of information and consultation to workers' representatives applies only to works councils and not to trade union representatives is also contested, as not all Member States of the EU operate a so-called "dual-channel" system, which distinguishes between representatives elected by the workforce in the establishment and trade union representatives. Thus, interpretation suggests that workers' representatives shall include trade union representatives together with works councils.

The aim of Article 27 is to protect the interests of the individual worker against the dominant position of the employer in situations in which those interests could be substantially affected. Apart from the need to protect workers in extraordinary situations, such as collective redundancies and transfers of undertakings, Article 27 also reflects the difficulties associated with globalization of the economy and the increased importance of transnational companies and mergers of undertakings. Such trends could effectively weaken national traditions of workers' involvement in the decision-making process.

The CFREU addresses issues which form the core of labour law and industrial relations in Europe: freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30). Following the entry into force of the Lisbon Treaty in 2009 the CFREU has the same legal value as the European Union treaties. Therefore inclusion of the right to information and consultation has great significance for employees of the Member States.

Workers' right to information and consultation appears right as the first article in the Solidarity chapter of CFREU. The implication of this Chapter is that the traditional individual and liberal rights and social rights creating networks of solidarity among the citizens of the EU have equal importance for the European Union. Thus the right to information and consultation is an elementary right in the context of the EU, and Article 27's reference to the national laws and practices implies that the Member States are obliged to maintain at least the mandatory standards of information and consultation provided by statutory law or by collective agreements.

Article 27 provides that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the

conditions provided for by Community law and national laws and practices. This provision is rooted in already existing sources in EC law, such as Directives 98/59/EC (collective redundancies), 77/187/EC (transfers of undertakings) and 94/45/EC (European works councils).[308] It is noteworthy that this approach of induction used by the EU was just the opposite that of the Council of Europe's deductive method, whereas the general obligations of information and consultation appeared first, followed by specificities of collective redundancies.

The previous wordings of the Article reveal the quest for the common denominator during the legislative process. The scope of information and consultation is confined to "matters which concern them within the undertaking" was deleted in the final text, thus potentially increased the scope of information and consultation to include matters beyond the undertaking. Thomas Blanke considers the reference to 'workers or their representatives' to be a major regression from the earlier formulation of 'workers and their representatives'. He also argues that the new wording contradicts the Community *acquis* in other directives.[309] Earlier references of Article 27 to 'all levels' were replaced by the requirement to apply "at the appropriate levels" which could also be considered as step back compared to the initial intention of the legislator. On the other hand, the phrasing 'information and consultation in good time' was inserted at a later stage, suggesting that the information must be given and the consultation procedure must occur prior to the final decision of the management.

It is apparent from the phrasing of Article 27 that the employer has an obligation to inform and consult either workers directly or their representatives. Direct information and consultation of individual workers could be considered as an 'appropriate level' only in very small companies or establishments. Also, restricting the right for workers or their representatives to a right only for the individual workers would contradict the guarantee of the freedom of association in Article 12 of CFREU.[310] On the other hand, the view that the guarantee of information and consultation to workers representatives applies only to works councils and not to trade union representatives is also contested, as not all Member States of the EU operate a so called dual-channel system, which distinguishes between representatives elected by the workforce in the establishment and trade union representatives. Thus interpretation suggests that workers' representatives shall include trade union representatives together with works councils.[311]

Similarly to the provisions of the European Social Charter, Article 27 is not based either on co-determination. Instead, the aim of Article 27 is to protect the interests of the individual worker against the dominant position of the employer in situations in which those interests could be substantially affected. Apart from the need to protect workers in extraordinary situations, such as collective redundancies and transfers of undertakings, Article 27 also reflects to the difficulties associated with globalisation of the economy and the increased importance of transnational companies and mergers of undertakings. Such trends

[308] Directive 94/45 was repealed and replaced by the Recast Directive of 2009/38.
[309] T. Blanke, *Workers' right to information and consultation within the undertaking*, in: B Bercusson (ed) at 46.
[310] Commentary of the Charter of Fundamental Rights of the European Union of EU Network of Independent Experts on Fundamental Rights, 2006.
[311] Ibid at 236.

could effectively weaken national traditions of workers' involvement in the decision-making process.[312]

Blanke argues that Article 27 has as much or more to do with the protection of human dignity specified in Article 1 of the CFREU than with traditional social rights and the objective of democratisation of the economy. "As such it promises greatly to expand the scope both of traditional social rights and of practices of democratisation, to encompass threats to workers' dignity in the many new forms these threats assume in a globalised economy, society and environment.'[313]

Despite the fact that employee involvement signifies a very narrow part of human rights, and perhaps it is safe to say that its recognition is rather low, its importance shall not be overlooked. The significance of employee involvement in the development of democratic institutions is enormous. The estrangement of people from the handling of their own affairs at a workplace in a long run will lead to the abdication of not only the employees but the citizens towards participation which is a real danger to democracy. Thus, employee involvement shall be seen as essential to issues of social justice, human rights and democracy and must be promoted as such.

V Interim Conclusions

The research questions regarding this chapter were (Q1) *What are the most influential economic theories concerning employee involvement?;* (Q2) *What was the impact of employee involvement on mitigating the negative effect of the economic crisis?* and (Q3) *How employee involvement is addressed in human rights instrument?*

The economic input of employee involvement has been researched for decades, many hypotheses exist on both sides, aiming to prove either the inefficiency or the efficiency of employee involvement. The economic analysis of employee involvement started with the emblematic question of Jensen and Meckling asking "if co-determination is so efficient, why do managers not choose it voluntarily?"[314] I showcased various theories which prove wrong the presumption of the efficiency theory and argue that employee involvement has positive effect on establishments and enhance directly or indirectly competitiveness. I also looked into the possibility to make employee involvement compulsory at workplaces. Whereas the default setting with opting-out options could be justified in many areas of labour law, I argue that it is not suitable to facilitate employee involvement. In my views, the Howthrone-type researches show the importance of genuine employee participation over the role of compulsory workplace settings. Genuine participation requires the duty of understanding of the importance of involvement and of activity on both the employers' and the employees' side.

---

[312] Blanke, supra at 49.
[313] Blanke, supra at 50.
[314] Jensen and Meckling 1976:9.

I compared the views of Hugo Sinzheimer and Amartya Sen on the interrelated nature of economic, political and social democracy, as well as on individual freedom. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties. [315] On a Kantian recognition of human dignity, [316] Sinzheimer argues that the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations. [317] Sen, challenging the "Lee Thesis", [318] asks the question of what should be more urgent for policy makers: to eradicate poverty, or to guarantee democratic rights (for which poor people have little use anyway)? Sen's answer to this question is very straightforward: economic development and liberty are interconnected. Separating them or prioritizing one over the other is entirely the wrong approach. Without freedom, including the opportunity to participate in decision-making on matters affecting the main areas of an individual's life there is no economic development. Likewise, economic development fosters individual and social freedom. [319] Regarding (Q2), I selected four recent studies[320] examining the performance of companies during the crisis and all of them argued that despite the crisis, social dialogue at national, sectoral and company levels have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis. [321]

Concerning (Q3) I concluded that he 'older brother' of participatory rights, the right to bargain collectively gained recognition in a much less contested way and now is acknowledged by most major human rights instruments. [322] To the contrary, employee involvement first appeared in late 1980s and only in European human rights instruments. The low recognition could raise concerns whether the right to involvement is a fully fledged human right, however, both the European Social Charter and the Charter of Fundamental

---

[315] Dukes, supra 346.

[316] Kant has phrased the principle of human dignity in the archetypal maxim that what possesses dignity must not be treated purely as a mean but also as an end in itself; for more on Kant's approach to human dignity see, O Höffe 'Kant's innate right as a rational criterion for Human Rights' in L Denis (ed) *Kant's Metaphysics of morals: a critical guide* (Cambridge, 2010, CUP), 71 ff.

[317] Dukes, supra 345.

[318] Sen argues against the 'Lee Thesis', named for President Lee Kuan Yew of Singapore, which states that denying political and civil rights is acceptable if it promotes economic development and the general wealth of the population (Sen, 1999:15). He rightly insists that we should approach political freedoms and civil rights not through the means of eventually achieving them (GDP growth) but as a direct good in their own right. Freedom is also good because it creates growth. See, O'Hearn 'Amartya Sen's Development

[319] A Sen (1999) 158.

[320] C E Triomphe, R Guyet and D Tarren, '*Social Dialogue in Times of Global Economic Crises'* (Eurofund, 2010), V Glasner and B Galgóczy, '*Plant-level responses to the economic crisis in Europe'* (ETUI-REHS, 2009), I Guardiancich (ed) '*Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia'* (ILO (EC), 2010); B Segol, M Jepsen and P Pochet (eds) '*Benchmarking Working Europe 2014*' (ETUI-ETUC, 2014,).

[321] S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), 75. Cluwaert, I Schömann, 'European social dialogue and transnational framework agreements as a response to crisis?' (2011) 4 ETUI Policy Brief

[322] For example, International Covenant on Civil and Political Rights , International Covenant on Economic, Social and Cultural Rights, Right to Organise and Collective Bargaining Convention, 1949 (No 98).

Rights of the EU are indispensable human rights instruments of the European region and their importance is unquestioned.

The European Social Charter is a human right convention of the Council of Europe, which establish a wide range of economic and social rights that are crucial for human dignity. Due to its wide geographic coverage, its role is indispensable in promoting human rights across the European continent. The CFREU addresses issues which form the core of labour law and industrial relations in Europe. Thus, inclusion of the right to information and consultation in this instrument signifies the stance of employee involvement as a fundamental human right. I also came to the conclusion that despite the fact that at times it is exercised by standing representative bodies, employee involvement is an individual human right which should be enjoyed unconditionally by all employees.

PART III
GLOBAL EXTENSION OF DEMOCRATIC PARTICIPATION

Chapter 1
Transnational Model of Participation

I Introduction

The trend of globalization has brought many new challenges to business management. The competition has become fiercer, and the quest for profit maximization has made large concerns spur on social dumping to continuously fight for yet lower production costs. Such practices often lead to human rights violation at workplaces. The frequency and the severity of these malpractices tend to be higher in premises where national laws are less protective and the influential power of workers is low. However, if we acknowledge that the right to participate is a human right with substantial effect on economic competiveness, it seems to be crucial to extend this right to employees working outside of the European Union.

Building up on the Weimar traditions, the European Union has developed an outstanding framework for employee involvement, which is at the same time capable to protect employees' right and suitable to meet business needs. However, due to the lack of regulatory power of the EU, European based multinational companies are not obliged to respect these protective rules of the EU. MNCs tend to draw up internal codes of conducts (COC) to promulgate minimal standards to be applied by their subsidiaries and subcontractors. These internal rules however are often proved to be non-efficient in most of the fields they intend to regulate, including to halt human rights violations, to improve working standards, or to enhance the voice of workers. Moreover, these company statues do not form a ground for liability when the rights of workers are violated.

While the EU considers employee involvement as a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by the

globalisation,[323] it explicitly reserves the right to the employees working within the territory of the European Union. Since human rights are indivisible and universal, it raises the issue of how the existing level of protection provided by the EU could be transferred to subsidiaries of Europe-based MNCs located outside of the territory of the European Union. The following chapter first introduce what are the currently available regulations which promote employee involvement on a global scale, then, the participation framework of the European Union will be examined with an eye to the possibility to extend the application of the participation framework to non-European business operations. Finally, the shortcomings of the European regulations will be analysed and the pitfalls of Directive 2002/14/EC are demonstrated through the case of Hungary, where the regulations regarding employee involvement were recently changed to the detriment of employees.

II International Standards for Employee Involvement

Formation of regulations is no longer an exclusive domain of states and governmental authorities, the role of non-state actors in standard setting is increasingly diverse.[324] The characteristics of this method of norm setting are that the process is not unilateral but often international and the formation of regulations is at least partially taken over by the private sector, particularly in areas where governmental efforts failed, or where stakeholders are concerned that international treaties do not adequately took their interest into account.[325] This section will examine the various soft law measures promoting employee involvement on a global scale.

A OECD Guidelines

The OECD Guidelines aim to ensure that the operations of multinational enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are a comprehensive catalogue of social and economic norms and multinational enterprises and their subsidiary companies are expected to carry out their business activities in line with these principles. They are supposed to be applied not only

[323] Directive 2002/14/EC Recital (9)
[324] Anne Peters, Lucy Koechlin, Gretta Fenner Zinkernagel, *Non-state actors as standard setters: framing the issue in an interdisciplinary fashion*, CUP, 2009.
[325] Ibid, 2.

within the territory of OECD but world-wide, especially in developing countries.[326] Thus, the Guidelines have an important role to play in promoting observance of these standards and principles among multinational enterprises, consistent with applicable laws and internationally recognised standards.

The Guidelines are originated back to 2000 and were reviewed in 2011. The Guidelines are recommendations jointly addressed by governments to multinational enterprises, they provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. The 2011 updates enhanced the binding nature of the Guidelines by adding that the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore, matters covered by the Guidelines may also be the subject of national law and international commitments.

The 2011 updates extended the reporting obligations of the multinational enterprises. The aim was to encourage improved understanding of the operations of multinational enterprises. The revision underlines the importance of clear and complete information on enterprises to a variety of users ranging from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large.

The updates make further suggestions and encourage the corporations to communicate additional information that could include a value statements or statements of business conduct intended for public disclosure including information on the enterprise's policies relating to matters covered by the Guidelines; policies and other codes of conducts to which the enterprise subscribes; information on internal audit, risk management and legal compliance systems; and information on relationships with workers and other stakeholders.

Chapter V[327] of the Guidelines deals with employment and industrial relations. According to its provisions, enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices; and also within the framework of applicable international labour standards[328] provide information to workers' representatives. Such information is needed for meaningful negotiations on conditions of employment and which enables employees to obtain a true and fair view of the performance of the entity, or where appropriate, the enterprise as a whole. The revised text adds that enterprises shall also promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern.

The Guidelines provide for that the multinational enterprises shall observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country. The 2011 updates of the Guidelines also aim to provide directions for cases when multinational enterprises operate in developing countries. It obliges the enterprises to provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families.

---

[326] OECD 21
[327] Previously Chapter IV.
[328] Added by the 2011 amends.

The Guidelines provide for similar process for collective redundancies to the one described in the respective EU Directives, stating that reasonable information shall be given to representatives of the workers about their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects, preferably prior to the final decision being taken.

The OECD Guidelines are often compared with the ILO MNE Declaration. Distinctions between the function and aim of the two instruments are made in the Commentary of the Guidelines. The Commentary specifies that while the ILO MNE Declaration sets out principles in the fields of employment, training, working conditions, and industrial relations, the OECD Guidelines cover all major aspects of corporate behaviour. The OECD Guidelines and the ILO MNE Declaration refer to the behaviour expected from enterprises and are intended to be parallel and not to conflict with each other. The ILO MNE Declaration can therefore be of use in understanding the Guidelines to the extent that it is of a greater degree of elaboration. However, the responsibilities for the follow-up procedures under the ILO MNE Declaration and the Guidelines are institutionally separate.

The Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. NCPs assist enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines. They provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines. However, the NCP's action does not always satisfy its clients. The activity of the Swiss NCP was widely criticised in the Triumph International case, questioning the efficiency and the unbiased nature of OECD monitoring capacity. The below case also demonstrates that European companies, trusted for promoting human rights and safeguarding labour rights – like Triumph International – use double standards for their employees working at overseas subsidiaries regarding participation.

i The Triumph Case

One of the key features of the textile industry – one of the principal industries in the global economy – is that labour-intensive production is increasingly allocated to countries with cheap wages and lax labour standards, especially to countries of South Asia. Triumph International, headquartered in Germany is presented in 120 countries employing over 44,500 people worldwide; its turnover exceeds 1.9 billion euro. The company set up a EWC for its European branches in 1996. Triumph International owns about 60 per cent of the production sites in its supply chain, which is considered as a very high ratio in the garment industry. In December 2009 a coalition of labour unions, NGOs and labour support groups filed a complaint against Triumph International for carrying out massive layoffs without consulting

unions in the Philippines and Thailand. The majority of the workers who were laid off were union members, including union leaders. The case could be summarised as follows.

Triumph International's subsidiaries in the Philippines (TIPI) decided to close down its factory in July 2005, resulting in 1663 workers losing their jobs. TIPI had a collective agreement effective with the local union, however, the 'separation money' offered to the workers was not in line with the provisions of the collective agreement. However, TIPI warned the union that if they had planned any organized action against the decision, they would have withdrawn their offer on the separation money and would sue individually all the workers involved. The trade union refused to accept the offer, claiming that no information had been given to them on the closure. The factory was eventually closed down and severance payment was paid to the workers.

Few years later in August 2009, nearly 2,000 workers were suddenly retrenched at Triumph's Thai factory (BFT), including 13 out of 19 union representatives, cutting the factory's workforce in half. The Thai factory paid severance payment to the workers, but not according to the Thai Labour Relations Law and the effective collective agreement between concluded with the workers' representative trade union.

The union and its affiliates filed inquiries to many international organizations, including the Delegation of the European Commission in the Philippines, but received no acceptance. In December 2009 the Unions turned the case to OECD and asked the Swiss NCP to set a concrete timeline for handling this case, as well as to facilitate communication and exchange between the parties in an impartial, transparent and objective manner. Although Triumph initially appeared to be open to the NCP process, the company subsequently refused to enter any mediation meetings in which the issue at the core of the complaint would be discussed. The NCP refused to hold meetings in Thailand or the Philippines and was also not willing to provide funding to help bring the victims to Switzerland or for translation of key documents. According to one of the complainants, 'the NCP performed the bare minimum of forwarding the letters between Triumph and the unions, but never made any constructive proposal to facilitate a mediation meeting or to investigate independently the case.'[329]

In its final statement, the NCP did not make any determination as to whether the OECD Guidelines have been breached by Triumph, nor does it make recommendations to enhance implementation of the Guidelines. As a summary of the proceeding, the NCP stated that '[the] parties concerned had a different understanding on the objectives of the proceeding and it was therefore not possible to reach such an agreement. In view of this situation, the NCP sees no possibility to further contribute to the solution of the conflict.'[330] The end of the procedure was indeed abrupt and questioned the ability of the Swiss NCPs to perform its role as an unbiased mediator.

The lesson learnt from the Triumph case should be that the impact of OECD Guidelines on economical and social sustainability is relatively low. It is welcomed that the OECD takes part in the discussion of employee involvement and that the revised Guidelines refer to ILO norms. On the other hand, the Guidelines are merely recommendations, which

---

[329] http://oecdwatch.org/news-en/swiss-ncp-fails-to-resolve-labour-dispute-over-triumph2019s-mass-dismissals-in-asia; retrieved on 24 August, 2013

[330] Closing Statement: Specific Instance regarding Triumph in the Philippines and in Thailand (Berne, 14 January 2011) page 3.

make the effective application of the provisions quite questionable. It is even more uncertain how the Guidelines could be enforced in the non-Member Countries of the OECD. On the other hand, it is apparent that even European MNCs are bypassing its regulations due to the lack of effective enforceability.

B Informal Methods to Enhance Information and Consultation on a Global Scale

Adopting the transnational approach of the international instruments facilitating employee involvement, management and labour have tried to initiate different methods to enhance cooperation. A research conducted on global employee representation at transnational companies [331] mapped four different forms of transnational structure for employee representation on an undertaking level: World Company or Group Councils; World Works Councils; extended EWCs; global information committees. Due to scarce data in this field, I will only examine World Works Councils and extended EWCs in particular.

In case of World Works Councils, standing bodies are operating on bilateral terms, and their operation is based on the agreement of employee representatives and central management. Probably the best known example for World Works Council (WWC) is Volkswagen. At Volkswagen (VW) efforts to include employees on a global scale date back to the 1970s.[332] The EWC agreement concluded in 1992 (two years before the Directive was adopted) served as a blueprint for WWC set up in 1999, consisting representative from all companies in which VW has the predominant stake. [333] The guiding principles of the agreement between the central management and trade unions reflect well the approach of management towards employee participation.[334] The structure and mode of operation allows both sides to see a contribution towards global cooperation and joint resolution of the possible conflicts by constructive dialogue and cooperative resolution of economic, social and ecological challenges.[335] Unlike most WWCs, the one at VW is still quite active.[336]

The extension of the EWCs including non-European participants contains two models: the one based on agreement, where the central management agrees to hold plenary EWC

---

[331] Stefan Rüb, *World Works Councils and Other Forms of Global Employee Representation in Transnational Undertakings*, Hans Böckler Stiftung, Arbeitspapier 55, 2002

[332] Solidarity among German workers towards South African fellow employees suffering from the oppressive regime was outstanding in the 1980s.

[333] At the time the research was conducted it was 40 production operations worldwide.

[334] These are: compatibility with social responsibility and competitiveness, securing compatibility as an aim of social dialogue, commitment on the trade union's end to cooperate and commitment on the management side to respect freedom of association and freely and democratically elected employee representatives in all parts of the VW group. See, Rüb, 2002, 23.

[335] Agreement for Cooperation between Volkswagen Group Management and the Volkswagen Group Global Works Council from 20 May 1999.

[336] See press releases on the WWC agreement between VW and UAF in October 2013.

meetings and the one with the independent decision of the employee side, which is solely for internal meetings. An example could be Danone's case: the international union of the food sector managed to conclude an agreement with the central management in 1996, agreeing that a consultative committee representing Danone workers from all European countries would be informed about the strategic decision of the company.[337] Even though the agreement was concluded before the substantive enlargement of the EU, it is striking that a clear distinction was drawn between European and non-European countries, the latter are simply represented by the trade union, and are not members of the committee.

Information committees offer the most limited form for global employee representation, mostly dealing with ad-hoc specific issues. However they could be important signs from the management side, marking the initial acceptance of global employee representation as a part of management.

Unfortunately, both the historical development and the current status of global employee representation forms are poorly documented. As far as it could be tracked, some of the forums rarely meet after their establishment, sometimes only once in five years or even less often.[338] The limited financial resources, management opposition, language barriers and poorly defined powers were the most frequently reported obstacles of global cooperation. It was concluded by the above mentioned research that global structures for employee representation in transnational undertakings are still in their infancy.

Having reviewed the above findings, it could be observed that one of the major impediments resulting in poor stability and lack of continuity is the absence of solid regulatory background. Soft law regulations are unable to ease the dependency on the willingness of management to play an active role in participation, to disclose information or finance the activity of global representative bodies. The quoted research showed that representative bodies at companies with solid traditions in participation and pre-existing patterns of employee participation could carry on a significantly better performance. [339]

While the different soft law mechanisms could successfully facilitate cooperation on a global scale and could also contribute to lowering the resistance of management concerning employee involvement, it has to be noted that without enforceable legal framework, these mechanisms could not provide sufficient guarantees for participation. It is the state's responsibility to create hard legal norms. However, the Sinzheimerian principle of economic democracy ought to be respected: legal norms are to protect labour, yet at the same time it has to respect the autonomy of economic actors.

---

[337] Information concern economic and financial information, technological projects, major investment decisions, organizational issues, training, health and safety, environmental issues, equal opportunities, trade union rights and others mutually agreed upon. See: Agreement on the Constitution of an Information and Consultation Committee for Danone, 11 March 1996, in: Rüb, 2002, 51.

[338] Even at Volkswagen group, the World Group Committee had a 7-year long brake in the 1980s. See, Rüb, supra, 21.

[339] Mostly German and Japanese undertakings. See, Rüb, supra, 6.

Chapter 2
Possibilities of Extraterritorial Jurisdiction of the EU

Since the existing regulatory framework could be considered ineffective, a directive with an extraterritorial scope would be needed. I take the liberty to make up an experiment regarding the possible extension of the personal scope of Directive 2002/14/EC on Information and Consultation together with Directive 2009/38/EC on the European Works Council. It will be examined whether in theory the extension of the scope could ensure that all employees employed by a European multinational company have sufficient access to information and are consulted on matters relevant to their employment. Both directives are equally important in that sense, as Directive 2009/38/EC is the 'agent' which enables employees to have access to information and serves as a forum for consultation.[340] Even though the EU is reluctant to refer to extraterritorial jurisdiction, there is an example for external action in environment protection. The EU's policy on environmental issues also has a dual character: it encompasses human rights and trade-related elements, and could therefore serve as a reference point. Before elaborating on the possibility how to extend the application of the respective EU Directives through their personal scope, I briefly introduce the two legal measures.

I Employee Involvement in the European Union

A Information and Consultation

The Directive on informing and consulting the employees was the pioneer legal instrument in which the EU made obligatory to all Member States to provide adequate measures for employees to obtain regular information and consultation on their employing undertakings. In that sense the Directive indeed signified a vital complement to the higher degree of harmonization of social laws in Europe and has had major impact in countries with voluntarist[341] tradition or in those (mostly new) Member States where employee involvement

[340] Art 1. 2 of Directive 2009/38/EC.
[341] Such as England or Ireland

had not become a genuine part of industrial relations.[342] The adoption of Directive 2002/14/EC has had a great significance on national level information and consultation issues in the Member States. The adoption of the Directive was not overly smooth due conflicts of the different national industrial relation systems.[343] The Renault case[344] gave new impetus to the proposals and eventually the Directive was adopted in 2002.[345] The Directive provides for minimum requirements applicable throughout the Community[346] and leaves the practical arrangements to be defined and implemented in accordance with national laws and industrial practices.[347] The objective of the Directive is to establish a general framework for informing and consulting employees in the European Union. The Directive provides for a right to be informed and consulted, thus it is not mandatory: if employees do not request it, employers are not obliged to provide information or consult employees.[348]

Information is defined in Article 2(e) as transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it. Employees' representatives are those who are defined as such by national laws and/or practices. Thus, Member States are allowed to use not only standing bodies but also individual representatives. Consultation means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

The employer is obliged to provide sufficient information in good time and at an appropriate level on the undertaking generally,[349] conduct timely information and consultation sessions on specific issues in particular, like where there is a threat to employment or which could lead to substantial changes in the organisation.[350] Article 4 of the Framework Directive specifies that consultation has to take place: (a) while ensuring that the timing, method and content thereof are appropriate; (b) at the relevant level of management and representation, depending on the subject under discussion; (c) on the basis of information supplied by the employer in accordance with [the notion of information] and of the opinion which the employees' representatives are entitled to formulate; (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; (e) with a view to reaching an agreement on decisions within the scope of the employer's powers [concerns information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual

---

[342] In the case of Hungary for example even though that the Labour Code of 1992 created the institution of works council, it has not got well rooted in the corporate sector and therefore could not fulfill its role. For more on that see Attila Kun, *The 'dual' representation of workers at the workplace level in Hungary*, Studia Iuridica Caroliensia IV, 2009, 89-113.

[343] Especially the differences between single channel and dual channel system made the adoption difficult. See, C Barnard, '*EU Employement Law'* (2012) 685-686.

[344] The French car manufacturer, Renault closed its plant in Vilvoorde, Belgium without prior information and consultation of the employees. As the Commission pointed out, the existing legal regulations were not enough protective, if they did not guarantee the right to information and consultation *prior to* the decision of the employer.

[345] OJ L 080, 23/03/2002 P. 0029 – 0034.

[346] Art. 1.1.

[347] Art 1.2.

[348] C Barnadrf, supra, 685.

[349] Art. 4.2.(a)

[350] Art. 4.2.(b)-(c)

relations].”[351] It is also provided for that the representatives of employers and employees shall work in a spirit of cooperation.[352]

Recital 7 of the Directive emphasises the importance of social dialogue and mutual trust between the employers and their employees in improving risk anticipation and flexibility. It also states that the promotion of employee involvement facilitates the undertakings’ competitiveness. Recital 9 further stresses the significance of timely information and consultation for companies to compete better in a global environment. Recital 13 declares that the existing legal frameworks for employee involvement both at Community and national level pursued an excessively *a posterior* approach to the process of change.

The Member States could apply the Directive either to undertakings employing at least 50 employees in any Member State, or to establishments employing at least 20 employees in any Member State.[353]

B European Works Council

Directive 94/45/EC[354] introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies on the progress of the business and any significant decision at European level that could affect their employment or working conditions. This Directive was repealed and replaced in 2009 by recast Directive 2009/38/EC.[355] To overcome some of the shortcomings arising from the insufficient measures of the relevant legal instruments,[356] especially of those related to the unequal treatment of employees concerning procedures for informing and consulting on a transnational scale, the recast Directive adopted measures to enhance dialogue to make it possible to employees to anticipate and manage changes related to the undertakings.[357]

The recast Directive pursues a two-stage approach for transnational information and consultation process for community scale undertakings or group of undertakings. The first step is based on the voluntary agreement of labour and management, while the second step, when no agreement could be reached, is the application of the mandatory provisions provided for by Article 7 and elaborated by the Annex of the Directive. Section II of the EWC

---

[351] Article 4 of Directive 2002/14; emphasis added.
[352] Art. 1.3.
[353] Article 2 (a) of the Directive defines undertaking as a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States. Article 2 (b) defines establishment as a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources.
[354] OJ [1994] L122/28.
[355] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 OJ L 16.5.2009 28-44.
[356] Apart from Directive 2002/14 as referred above, see Directive on Collective Redundancies (Council dir. 75/129/EEC (OJ [1975] L48/29) amended by Council Dir. 92/56/EEC (OJ [1992] L245/13) and Directive on the Transfer of Undertakings (Council Dir. 77/187/EEC (OJ [1977] L61/26, amended by Directive 98/50 (OJ [1998] L201/88) and consolidated in Directive 2001/23 (OJ [2001] L82/16)
[357] Directive 2009/38/EC, recitals (10)-(15).

Directive provides for the establishment of a European Works Council or an Employee Information and Consultation procedure. Negotiations are put in focus with the aim to activate central management or employees.[358] The parties either could decide to set up a European Works Council by concluding an agreement on the scope, composition, function and term of service of an EWC; or could agree to implement an Information and Consultation Process (ICP) instead, a less formalized form of employee involvement.[359] Whether a EWC or an ICP is established, the minimum requirements provided for by the Directive do not need to be incorporated into the agreement.[360]

In the spirit of autonomy, the parties are entitled to determine the nature, the composition, the function, the mode of operation, the procedures and the financial resources of a EWC.[361] If an agreement is reached, it means that the parties are almost free to set the content on the information provided to the employees as long as it meets the requirements of the Directive. In case the parties consent to set up a EWC, the agreement shall include the details of the undertakings covered by the agreement; the composition of the EWC; the number of members; the allocation of seats and the term of office; the function and procedure for informing and consulting the EWC, the venue, frequency, and the duration of meeting of the EWC; the financial and material resources to be allocated to the EWC; the duration of the agreement; and the procedure for its renegotiation.[362]

In case the parties decide to set up an ICP instead, they ought to specify the methods by which the employees' representatives have the right to meet and discuss the information transmitted to them. The data must contain information on transnational matters considerably affecting the employees' interest.

Article 8.1 provides for regulations on confidential information. It allows Member States to adopt national regulations providing that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence. The same could be applied to employees' representatives in the framework of an information and consultation procedure. Article 8.2 states that each Member State could provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or be prejudicial to them. However, the concept of confidentiality is not well addressed. Whilst Article 8.1 provides for that confidential information must not be revealed to third parties, it does not specify either what type of information can be considered as confidential for the purpose of this Article or who these third parties are.[363] Thus, it is the national legislator who has the opportunity to define the notion of confidentiality. It is suggested that this provision must be read strictly in the light of the principles of transparency and mutual trust. Otherwise the objective of the EWC Directive would be inverted and a EWC would become a 'secret

[358] Art. 5.1. of Directive 2009/38/EC.
[359] Art 4.1. of Directive 2009/38/EC.
[360] Art. 6.4. of Directive 2009/38/EC.
[361] Recital (19) of Directive 2009/38/EC.
[362] Art. 6. of Directive 2009/38/EC.
[363] Picard (2010:111)

club whose members were sworn to secrecy'.[364] Another aspect of confidentiality was highlighted in the Grongaard case.[365] The Court ruled that the Directive on Insider Dealing[366] precludes the employees' representative from disclosing confidential information to any third party, unless such disclosure is made in the normal course of his employment, profession or duties, unless there is a close link between the disclosure and the exercise of his employment, profession or duties and that disclosure is strictly necessary for the exercise of that employment, profession or duties. However, due to the lack of related cases, it has not been addressed whether informing employees would be in a scope the exercise of duties of the employees' representative.

The two stage process of the EWC Directive was designed with an aim to encourage employers to be open to employees' initiatives.[367] By reaching an agreement an employer can avoid the mandatory provisions which are formulated with a penalizing nature. However, the requirements do not create the impression that the procedure provided for by the Annex is equal to a 'worst-case scenario'. The subsidiary requirements provide for one information and consultation meeting per year, based on the written report drawn up by the central management.[368] Information shall cover the structure, the economic and financial situation of the business; the probable development of the business, production and sales; the employment situation and future trends; the investments and substantial changes concerning the organization of the business; the introduction of new working methods or production processes; the transfers of production; and the mergers and cutbacks or closure of undertakings or collective redundancies.[369] The list is indeed lengthy. On the other hand, since these data are combined for many compulsory and voluntary reports transnational undertakings are otherwise bounded by,[370] neither the quality nor the quantity of information put an excessive burden on the employers.

---

[364] Ibid.
[365] Cf. Case C-384/02 Grongaard [2005] ECR I-9939
[366] Dir. 89/592, now Dir. 2003/6
[367] Barnard, 2012.
[368] See Annex 2. In addition to this, a select committee compromising of no more than five members of the EWC shall be set up. This committee can be informed of important decisions matters significantly affecting the employees' interest, like collective redundancies, factory closures and so forth. Upon its request, the select committee has the right to meet the management as soon as possible.
[369] Annex 1.(a).
[370] For example the Global Reporting Initiative on sustainability. For checklist see https://www.globalreporting.org/resourcelibrary/English-Lets-Report-Template.pdf (retrieved on August 13, 2013)

C New Directions in the Employee Involvement Policy of the EU

Reflecting to the recent financial crisis and its effect to businesses, the Opinion of the European Economic and Social Committee [371] (EESC) states, that adopting a multi-stakeholder approach involving the investors, employers and employees and a positive approach towards efficient social dialogue is necessary to mitigate the negative effects of the crisis. The EESC opinion recalls that business sustainability also strongly relies on the different forms employee involvement, such as information, consultation and, where applicable, co-determination too. To achieve a good business management concept, the voice of employees has to be respected in business decisions. This obligation also follows from Article 27 of the EU's charter of Fundamental Rights, making employee involvement a part of the legal framework of European democracy.[372]

The EESC urges the European policy-makers to create appropriate incentives and improve the requisite legal framework with no interference with the national competences though. Further, the EESC implies that European company law shall cater more for employee involvement. The role what employee involvement could play in regaining economic competitiveness underlines the need for corrective actions against the short-term of corporate values and for increased corporate transparency.[373] It is suggested that a sustainable company is centred on the principle of 'fair relationship', which is a part of the multi-stakeholder management approach.

The Opinion outlines possible new directions to improve employee involvement rights on a transnational level. The standpoint of the opinion is to safeguard national diversity to keep European businesses competitive while standardizing of divergent definitions to ensure consolidation and provide for more legal certainty. [374] Setting obligatory employee participation in company boards and creating binding minimum standards for restructuring are also key elements of the proposal.[375]

Though the Opinion envisages an innovative approach to mitigate the negative effects of economic turmoil by strengthening the role of employee involvement in business management, it only focuses on business activities located on the territory of the European Union. Such limited personal scope overlooks that transnational companies often operate subsidiaries outside of the Member States. The activity of these undertakings significantly contributes to the overall performance of the group. To mention one aspect, transnational companies often benefit from the cheap labour force and low influential power of the employees working in non-Member States. While acknowledging that the different albeit generally lower standards of the non-EU countries constitute a competitive edge for most European multinationals, consolidation of the business practices cannot be complete if it does

[371] Opinion of the EESC on Employee involvement and participation as a pillar of sound business management and balanced approaches to overcoming the crisis, SOC/470, Brussels, 20 March 2013.
[372] Ibid, 2.3, 2.4.
[373] Ibid, 2.5, 2.6.
[374] Ibid, 4.2.
[375] Ibid, 4.2.5, 4.3.

not reach out to the branches situated outside of the European Union. To overcome this discrepancy, I propose to change the personal scope of the regulations regarding employee involvement.

II Extension of the Personal Scope of the EU Directives

A Personal Scope and Transnational Character

In terms of personal scope, three important points has to be considered to investigate further the possibility of its extension. One is the definitions provided for by Directive 2009/38/EC. According to the Directive, a 'community-scale undertaking' means any undertaking with at least 1,000 employees within the Member States, and at least 150 employees in each of at least two Member States; a 'group of undertakings' means a controlling undertaking and its controlled undertakings; and a 'community-scale group of undertakings' means a group of undertakings with the following characteristics: at least 1,000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State, and at least one other group undertaking with at least 150 employees in another Member State.[376] The Directive also provides for the definition of a controlling undertaking: for the purposes of the Directive, a 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation, or the rules which govern it. The ability to exercise a dominant influence has to be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly: (a) holds a majority of that undertaking's subscribed capital; (b) controls a majority of the votes attached to that undertaking's issued share capital; or (c) can appoint more than half of the members of that undertaking's administrative, management, or supervisory body.[377]

Two is the scope of the Directive. The EWC Directive is not only applicable to undertakings or groups of undertakings which are located within the territory of the EU, but also addresses non-European businesses by stating that the mechanisms for informing and consulting employees in undertakings (or groups of undertakings) operating in two or more member states shall encompass all establishments, regardless of whether its central management is located inside or outside of the territory of the Member States. The aim of this extension is the protection of the European workforce, and it does not constitute extraterritorial legislation as it refers to business activities which take place within the EU.

---

[376] Art 2. 1 (a)-(c) of Directive 2009/38/EC.
[377] Art 3.1-2. of Dir 2009/38/EC.

Three is the notion of transnational character. According to the Directive, those matters have a transnational character which concern the entire undertaking or group, or at least two Member States. These include matters which are of importance to the *European* workforce in terms of the scope of their potential effects or which involve transfers of activities within the *Member States*.

To ensure that the right of information and consultation is effectively realized at subsidiaries of the Europe-based multinational companies which are located outside of the territory of the EU, the personal scope of Directives 2002/14/EC and 2009/38/EC should be expanded in a way that encompass all branches which are under the control of the controlling undertaking domiciled in the EU. The notion of a controlling undertaking in its current form could create a link to subsidiaries located outside of the EU territory. Regarding transnationality, as it was argued above, in reality the impact of these 'third country subsidiaries' are of great significance for the multinationals. Therefore issues related to their activity, or which involve transfers of activities between the operations, have an increased importance for the entirety of the workforce in terms of the scope of their potential effects'. All branches then should be included in the concept of the transnational character of a matter.

It may be argued that the enlarged territorial scope would constitute a competitive disadvantage to European multinational companies and therefore would encourage businesses to move their seats outside of the Member States. However, if the statements of the Recitals of the Directives and the EESC Opinion were true, then that would, on the contrary, ensure even higher level of competitiveness for European undertakings. There is a global tendency for industrialization to push national industrial relations (including labour law systems) toward uniformity or "convergence."[378] The more workers' participation is promoted, the more it supports the idea of cooperation, participation and joint responsibility.[379] The findings of Manfred Weiss have to be remembered here: if democratisation of the economy is understood as an element which promotes and stabilises democracy in the society as a whole, workers should have a similar chance to influence decisions by which they are affected.[380]

B Competency of the EU

The scope of competences of the European Union has been expanded by a doctrine of the implied powers, developed by the CJEU, which has the last word on competence issues.[381] The doctrine of implied powers indicates that the EU can either originates its powers expressly promulgated in the Treaties, or its competences can be implied.[382] For example,

---

[378] M Weiss, '*Convergence and/or Divergence in Labor Law Systems? : A European Perspective'* (2006-2007) 28 Comp. Lab. L. & Pol'y J. 469 .
[379] M Weiss, '*Workers' Participation: Its development in the European Union'* (2000) 21 Indus L. J. Juta, 738.
[380] Ibid, 745-746.
[381] Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, and Case C149/96 *Portugal* v *Council* [1999] ECR I8395, paragraph 34, also referred to in the ATA case (para 34).
[382] T Delereux, 'The European Union in international environmental negotiation: a legal perspective on the internal decision-making process' (2006) 6 *Int Environ Agreements*, 234.

Article 352 (1) TFEU states that '[if] action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.'

Such an expansion of the competences, especially in the field of employment and industrial relations, is not free from controversy. On the other hand, the international scope of the activity of the European Union have to be guided by principles which have inspired its own creation, development, and enlargement, and which seek to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[383] Implied powers exist where "internal power has already been used in order to adopt measures which come within the attainment of common policies,"[384] yet are not limited to common policies, but cover all Treaty objectives.[385] The importance of employee involvement either (or both) as a human right or (and) as a tool to enhance economic competitiveness is significant regarding democracy.[386] Moreover, back in 2001, the European Commission proclaimed that a 'more coherent and consistent approach' to human rights in its internal and external policies, with a view to promoting 'human rights and democratisation commitments in external relations' consistent with the EU Charter on Fundamental Rights is needed.[387] Thus, a possible action to enlarge the scope of Directives 2002/14/EC and 2009/38/EC would fulfil the above requirements and therefore could justify extraterritorial jurisdiction. There are only rare occasions when the European Union – usually critical on the issue – exercising extraterritorial jurisdiction. One of these exceptional cases was Directive 200/101/EC related to environment protection. I refer to this case as a possible example to protect a fundamental right and which could also be impactful for labour legislation.

---

[383] Art 205 of TFEU and Art 21 of TEU.

[384] Joined Cases 3,4 and 6/76 Kramer, Cornelius, and others [1976] ECR 1279

[385] Opinion 1/78 (Re Natural Rubber Agreement) [1979] ECR 2871

Sinzheimer believed that political and social democracy could only exist if they are accompanied by economic democracy. In his view, economic democracy has two complementary pillars: the self-regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy. See, Hugo Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden*, Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law (2008)* 35 Journal of Law and Society, 346; Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law*, (2012-2013) 34 Comp. Lab. L.& Pol'y J. 605-7

[386] Art 205 of TFEU and Art 21 of TEU.

[387] European Commission, Communication from the Commission to the Council and the European Parliament – The European Union's role in promoting human rights and democratisation in third countries, EU Doc COM/2001/0252 final.

C The Example of Environmental Protection

The European Court of Human Rights has derived state duties even with an extraterritorial dimension, to protect human rights against corporate violations in the field of environmental protection. These rights include adopting appropriate measures to regulate pollution issues, ensuring an informed decision-making process, providing access to information about dangerous activities, and enabling public participation in decision-making processes.[388] Under these conditions, the ECHR confers rights on victims to have the domestic law enforced against corporate actors, and to have the judgments of national courts upheld. Since Article 6 (2) of TEU provides that the EU accedes to the European Convention of Human Rights, the imposed duty of the Convention to protect human rights against certain violations that are committed outside of the territory of the Contracting States is applicable for the EU as well. On the other hand, EU environmental law (such as the environmental law of the Member States) does not apply extraterritorially. One important exemption is Directive 2008/101/EC on EU Emission Trading Scheme.[389]

Based on the provisions of Directive 2008/101/EC, as of January 2012, the EU Emission Trading Scheme[390] is applicable to all flights arriving and departing from EU aerodromes, including flights departing to or from third countries.[391] The aim of the regulation is to effectively reduce greenhouse gas emission. When the Directive was challenged by the Air Transport Association of America and Others,[392] the European Court of Justice rejected the claimants and held that, while the Directive cannot be applied to aircrafts registered in third states that are flying over third states or high seas, when the aircraft is in the territory of one of the Member states the aircraft is subject to the unlimited jurisdiction of that Member State and the EU.[393] Thus, if the regulatory background is connected to an internationally recognized goal (such as reducing emissions in the context of the Kyoto Protocol, of which both the EU and its Member States are members), activities conducted within the territory of the EU can be subjected to the jurisdiction of the Member State and the EU, even with regard to a third country actor.

Regarding its legitimate basis, the Emission Trade Directive relies on the 'effects principle' which tends to support the exercise of extraterritorial jurisdiction in commercial cases. The effect principle offers justification in cases when a foreign conduct produces substantial effects on the territory of a State.[394]

As the Court laid down in the ATA case, commercial activity, in the instance of Directive 2008/101/EC, air transport could be carried out in the territory of the European Union only on condition that third parties comply with the criteria that have been established

[388] p 21-22
[389] See also Aviation Directive 2008/101, Electrical and Electronic Waste Directive 2012/19.
[390] Emission Trading Directive 2003/87
[391] Para. 16. Directive 2008/101.
[392] ECJ Case C-366/10
[393] Ibid, paras 122-125.
[394] It should be noted though that the effect principle is not universally accepted as a valid basis for extraterritorial jurisdiction, see, the definition of Extraterritoriality in MPEPIL.

by the EU and which were designed to fulfil specific objectives (in the ATA case, environmental protection).[395] Though in cases of employee involvement the commercial activity, eg, the activity of a subsidiary, will not be directly carried out in the territory of the EU, the operation will indirectly have an influence on the European market. It could be a product manufactured outside of EU and sold in the EU, or, more generally, it could be manifested by the profit which flows from business activity and which appear in the books of the 'parent' company. Since the right to information and consultation is recognized as a fundamental right by CFREU, it can be assumed that its protection will constitute a value similar to that of environmental protection.[396]

[395] Ibid, Para 128.

[396] While the analogy between the nature of employee involvement and environment protection may not be strikingly new, I could not find any references in the literature concerning the extraterritorial jurisdiction of the respective regulations.

III Interim Conclusions

The research question I try to answer in this section is (Q4) *If employee involvement is a fundamental human right, thus, in that sense, has a universal value, what measures have been taken to promote it outside of the European terrain?* The significance of employee involvement has been gradually growing in the European Union. The learning curve from the 1980s has been very long indeed, and during these decades many of the initial problems have been addressed in the amends of the Directives addressing the right to be informed and consulted.[397] The change in the regulatory technique allowing more room for Member States for transposition with regard to the different traditions in industrial relations caters better for employee involvement and the strengthened legal status of the CFREU symbolizes its importance as a human right.

However, enjoyment of the right has not been guaranteed to all; absent fiat, employee involvement has not penetrated to subsidiaries of European multinationals located outside of the territory of the EU. To mitigate the regulatory gap, both international organizations and multinational enterprises have developed regulatory solutions. What legitimizes the norm-setting exercises of non-state actors are more transparent decision-making processes and the possibility of representing a broad range of views. Indeed, soft law, voluntary codes of conduct, and other non-binding instruments have an important role in facilitating employee involvement. However, voluntary actions have proven to be insufficient, and thus cannot be substitutes of enforceable legal instruments. Exercising extraterritorial jurisdiction by the EU might be a step towards filling the regulatory gap. However, the creation of a norm with extraterritorial scope would only address the issue of prescriptive jurisdiction, leaving the questions of adjudication and enforcement without an answer.

Expanding the personal scope of Directives 2002/14/EC and 2009/38/EC would, in my view, contribute to the recognition of the right to be informed and consulted both as a human right and as a tool for enhancing the economic competitiveness of European multinational companies. As a human right, it would be just and fair to provide the same rights (and duties) to every employee of a given corporation regardless of their location, as human rights are universal. Employee involvement can be seen as a tool for democratization,[398] thus, it would also support the democratization of industrial relations in the host countries. The expansion would create stronger ties between the headquarters and their third-country subsidiaries, and could serve as a tool for combating human rights violations caused by multinationals.[399] As an economic tool, the employer would benefit from the feedback and innovative ideas of its employees in a larger pool than before. By improving the employment conditions for workers

[397] Apart from Directives 2002/14 and 2009/38 as referred above, see Directive on Collective Redundancies (Council dir. 75/129/EEC (OJ [1975] L48/29) amended by Council Dir. 92/56/EEC (OJ [1992] L245/13) and Directive on the Transfer of Undertakings (Council Dir. 77/187/EEC (OJ [1977] L61/26, amended by Directive 98/50 (OJ [1998] L201/88) and consolidated in Directive 2001/23 (OJ [2001] L82/16)

[398] See for example Dukes, supra 345

[399] J Zerk, Multinationals and Corporate Social Responsibility (Cambridge, 2006, CUP) 104 ff.

worldwide, European companies could be better trusted and evaluated by consumers and therefore their market positions would be stronger.

It has to be also noted that multinational corporations are not traditional subjects of international law, and it is controversial as to which national law is able to impose direct duties on them; thus they often "fall through the cracks of the international regulatory system."[400] The picture becomes even more complicated by adding that multinational corporations are increasingly reliant on their supply chains, which are only connected to them through civil law contracts. Therefore enforcement of any corporate norms binding to the parent company in its supply chain is close to impossible.

The competence of extraterritorial jurisdiction may be exercised by way of prescription, adjudication, or enforcement. Prescriptive jurisdiction is the authority to lay down legal norms, adjudicative jurisdiction refers to the authority to decide competing claims, and enforcement jurisdiction stands for the authority to ensure compliance with the regulator's norms.[401] While it was argued that the specific importance of employee involvement may justify the unilateral decision of the EU to decide on its own competence to exercise jurisdiction beyond its territory, such justification could only refer to prescriptive jurisdiction. To ensure the effective compliance with a norm, issues of adjudicative and enforcement jurisdiction shall be addressed too—however, their analysis would go well beyond the scope of the current paper.

However, I would rather the interim conclusion be positive and forward-looking. Observations Sinzheimer made on the function of labour law are important to be remembered here. Protection of employees has essential importance to society, as the working power of man is not only an individual but also a social asset.[402] The worker serves the employer directly, but also serves society indirectly, argues Sinzheimer further, and thus society owes the worker an equivalent return for his service, and this equivalent return is the protection itself. On a Kantian recognition of human dignity,[403] for Sinzheimer the democratization of the industrial sphere through the economic constitution might have brought equality and real freedom for workers—freedom which is not manifested in the way that freedom of contract allowed exploitation, but freedom from subordination in employment relations. The right to employee involvement has to be kept protected both as a fundamental right and a tool to enhance economic competitiveness. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of the humanity of workers through involvement ought to be seen as a shared responsibility of global economic actors

[400] Zerk, supra 104.
[401] 'Extraterritoriality' in Max Planck Encyclopedia of Public International Law (MPEPIL, Oxford, 2009).
[402] Dukes, supra 345.
[403] Ibid.

Chapter 3
Problems related to the European Participation Model

I Overview

The main purpose of Directive 2002/14/EC is to set up a framework for an effective information and consultation procedure.[404] In accordance with the ECJ's case law on '*effet utile'*, during the process it ought to be ensured that the employees are entitled to formulate their opinions, to have response together with the related reasoning from management to their ideas and to participate in decision-making processes related to employment.[405] Having considered the advantages of social dialogue, Article 5 of the Framework Directive provides the opportunity for Member States to entrust management and labour at an appropriate level, including the level of the undertaking or establishment with the right to define freely the practical arrangement of the information and consultation procedure. Effectiveness is further guaranteed by the timely and adequate ways – meaning the appropriate level and the fashion – of the information and consultation process.[406] However, since a fairly broad area is provided for the Member States for transposition, it can be observed that the domestic solutions often tone down the text and spirit of the Directive.[407] The below areas could be of concern with regard to the principles of equal treatment unified protection of employees of the European terrain.

The most problematic areas where inequality could seriously harm the principles of participation are the protection of employee representative and the sanctions imposed on employers in case of violation of the right to information and consultation of employees. According to Article 7 of the Directive, employee representatives shall enjoy adequate protection to perform properly their roles. However, the vague wording of the Directive does not provide distinct criteria whether the protection shall include favourable working conditions, paid working time or prohibition of dismissal. Some of the Member States apparently used this room to reduce the level of protection where possible. For example in Poland employees' representative supposed to carry out their tasks outside working hours, in Ireland it is unclear whether employees' representative are entitled to any earnings for the time spent for exercising their role, in Bulgaria only trade union members enjoy protection,

[404] Arts. 1. 1-2. of Directive 2002/14/EC.
[405] Art. 4.4. of Directive 2002/14/EC.
[406] Arts. 4.1 and 4.3. of Directive 2002/14/EC.
[407] Notably in Poland; see: Schömann (2006) supra 28.

while in the Czech Republic no protection is provided at all.[408] Thus, ambiguity in domestic laws leads to great inequality.

The Framework Directive indicates that effective, dissuasive and proportionate administrative and judicial procedures and sanctions ought to take place in case of the infringement of the obligations.[409] With other words, Member States are free to choose between civil and (or) criminal sanctions.[410] However, the regrettable lack of precision of the Directive makes it difficult for domestic courts to judge the threshold where the action of the employer impedes the right of information and consultation. Especially at times of economic constrain, labour courts tend to adopt a restrictive interpretation.[411] Again, national legislations provide for various sanctions. In some Member States a fine can be imposed on the employer who violates the right to information and consultation. However, both the process and amount vary greatly. Regarding the fines the difference is striking, the fine imposed could be in the range from EUR 6.5 to EUR 50,000. Such differentiation for the same action is hardly justifiable.

In Croatia a decision rendered by an employer contrary to the law's provisions on consultations with the works council is null and void. In case of a violation by an employer of the information and consultation obligations a fine of HRK 31,000 to 60,000 (EUR 4,217 to EUR 8,163) is imposed on an employer as a legal person.[412] In case of Denmark, employers who fail to inform and consult workers in accordance with the applicable rules may be fined as well. In Greece a failure to comply with the obligations emanating from the provisions of the decree results in enforcement of administrative penalties.[413] On an employer who violates the provisions of the Labour Law fine for each violation, from EUR 500 up to EUR 50,000 is imposed. Temporary pause of the operation of a particular productive procedure or a department, or even an enterprise or undertaking is possible for a time interval up to 3 days. In addition, the Minister of Employment and Social Insurance (after a justified proposal of the competent Labour Inspector) is entitled to impose on an employer a temporary pause of the operation for a time interval longer than three days or even a permanent pause of the operation of the particular productive procedure or of the department or of the departments or of the whole of the enterprise or undertaking. With regard to Bulgaria, a recent amend to the Labour Code have raised the sanctions applied in case of violation of the labour legislation with penalties from 10,000 to 15,000 BGN (EUR 5,113 to EUR 7,669) and in case of a repeated violation, the penalties applied are from 20,000 to 30,000 BGN (EUR 10,226 to EUR 15,339). In Estonia employers who violate this right may be sanctioned with administrative fines ranging from 100 to 6000 Estonian Kroons (EUR 6.5 to EUR 385). In the case of Italy the provincial labour directorates, which are part of the ministry of labour and social protection, are responsible for enforcing employees' right to information and consultation. Employers who fail to respect this right are liable to fines ranging from EUR 3,000 to EUR 18,000. Regarding Romania, employers who fail to meet the obligation to

[408] Schömann (2006) supra 31.
[409] Arts. 8.1-2 and Recital 28.
[410] In Poland the sanction is said to be not overly dissuasive, while in Czech there are no sanctions imposed at all, see Schömann (2006) supra 32.
[411] Schömann (2006) supra 32.
[412] Article 152§11 of the Labour Act
[413] Article 16 of Law 2639/1998.

inform and consult their employees are liable to a fine of RON 1,000 to 20,000 (about EUR 245 to EUR 4,907), while offenders who have failed to meet the requirement to establish consultation procedures with workers' representatives are liable to a fine of RON 2,500 to 25,000 (about EUR 613 to EUR 6,133). Lastly, in the event that the information provided by employers is incomplete or incorrect and hence prevents workers' representatives from adopting an informed opinion with a view to future consultation, the statutory fines range from RON 5,000 to 50,000 (about EUR 1227 to EUR 12,267).[414]

In other Member States fines cannot be imposed, but employees or their representatives could seek judicial and/or administrative remedies. For example in Belgium any body representing employees or any individual employee may take a case to the courts alleging failure to respect the obligations imposed by the relevant legislation. In Bulgaria each representative of the workers or employees elected, whether being a representative of a trade union organization or not, is entitled to lodge a claim in the court.[415]

To conclude, it is safe to say that though Directive 2002/14/EC was crafted with the best intention and manoeuvred rather well between the fairly different interests and traditions of industrial relations of the Member States, the sometimes vague wording and the ample room for national transpositions resulted in a variety of domestic systems with very different level of actual rights and obligations. Practically, such a flexible framework is not suitable to provide equal level of information and communication for workers of the European Union. The case of Hungary well illustrates that the flexibility provided by the Directive allows Member States to form the national systems almost arbitrary after the transposition. Hungary used all the opportunities for flexible interpretation given by the Directive to the detriment of employees during the re-codification of the national regulations, and now its compliance with the Directive is rather questionable in areas of protection of employee representatives and of adequate sanctions. First I provide a brief overview on the democratic transition regarding employee involvement, then analyse the current national regulations in Hungary.

II Evaluation of Information and Consultation Rights in the European Union

As a part of the 2010 work Programme[416] an evidence-based survey was conducted by the European Union on the effectiveness of information and consultation rights of employees in the European Union. [417] In particular, Directives 98/59/EC on collective redundancies, 2001/23/EC on transfer of undertakings and 2002/14/EC on a general framework of information and consultation was examined.

---

[414] Law No. 467/2006.
[415] Articles 7§2 and 7§a of the Labour Code
[416] Commission Work Programme 2010 COM (2010) 135 final.
[417] The so called "Fitness Check" see, Commission Staff Working Document, Fitness Check on EU Law in the area of Information and Consultation of Workers, SWD (2013) 293 final, hereinafter, Fitness Check.

On one hand, the general findings of the survey emphasise that evidence suggest that the mentioned directives address stakeholders' needs, as they are, among others, suitable to increase trust between management and labour, to involve workers in decisions affecting them, to protect workers, to contribute to increased adaptability, and to improve staff and company performance. It was also underlined that especially Directive 2002/14/EC was found capable to effectively promote workplace performance and to improve management and anticipation of change.[418] On the other hand, especially based on the reports of stakeholders, it was pointed out that the actual efficacy of the Directives in general and Directive 2002/14/EC in particular depends on several factors, especially the industrial relations system and social dialogue traditions of a Member State,[419] the size of an establishment and the attitudes of labour and management were mentioned. The EU seems to be satisfied with the results, conferring the information and consultation system to be "relevant, effective, coherent and mutually reinforcing."[420]

The opinion of the European Economic Social Committee's opinion,[421] referred to by the Fitness Check points out the urgent need of a more effective formulation of information and consultation rights in EU, and suggested the serious reconsideration of the various definitions of information and consultation rights for greater standardisation.[422]

However, the Fitness Check refers to stakeholders' complaint on the transposition of the Directives concerning the specific terms, such as 'establishment', 'good time', 'appropriate timing, method and content' or 'with a view to reaching an agreement' as "insignificant."[423] Also, the report treats the inherent flexibility of the notion of 'employee representative' as one the strengths of the Directives.[424]

The assessment also suggests that consultation is less likely to take place and tends to cover operational issues, like working time or work organisation, rather than business strategies. And evidence was also found that the arrangements concerning the working time, benefits and resources concerning employee representatives vary greatly among Member States.

I believe that these problems are far from insignificant. The case of Hungary represents very well that the ambiguity of provisions could lead to serious harm in national legislations. The vague wording of Directive 2002/14/EC allowed the Hungarian lawmaker to adopt a new employee involvement system, which is by and large meets the formal requirements of the Directive, but bypasses its objectives.

---

[418] Fitness Check, 2.
[419] Especially the UK and CEE countries are mentioned; Fitness Check, 13.
[420] Fitness Check, 4.
[421] "Employee involvement and participation as a pillar of sound business management and balanced approaches to overcoming the crisis" SOC/470, Rapporteur: W Grief.
[422] The EESC document even calls for the adaption of a single, consolidated framework directive.
[423] Fitness Check, 13.
[424] Fitness Check, 14.

III The Case of Hungary

A Introduction

Political changes were rather rapid in Hungary, between 1988 and 1992 key legislative movements laid down a completely new system, including industrial relations. Act No XXII of 1992 – the third Labour Code – was based on the principle of freedom of association and strived to create genuine, democratic form of participation. As a part of the reforms, works councils were institutionalised, although it is argued that the introduction of works councils was lacking genuine historical origins or theoretical foundations.[425] The original idea of the new works councils was based on the German dual-channel system; however, eventually it became a significantly weaker institution than its model. Works councils and trade unions were provided similar, sometimes competing rights at workplace level,[426] creating a "horizontal dual-channel system."[427]

On one hand, the formulation of the third Labour Code was naturally subject to political debates and the implementation of a dualistic model of participation indeed was a result of a political compromise. On the other hand it is important to note that in the midst of the crisis of industrial relations[428] the provisions of Act No XXII of 1992 on participation were still probably the best what trade unions could have achieved in safeguarding their former positions at workplace-level.

The decisions of the Constitutional Court concerning trade unions also shaped the reforms of industrial relations and had important impact on the bargaining position of trade unions.[429] In Decision No 8 of 1990[430] the Constitutional Court granted the petitioner who claimed the right of the trade unions to represent employees without authorization violated the Constitution.[431] The Constitutional Court argued the socio-economic environment where the

---

[425] Gy Kiss, *Munkajog* [Labour Law] (Budapest, 2005, Osiris), 451-53.

[426] Unlike in Germany, where works councils possess strong co-determination rights at workplace level, where employers ought take them as relevant negotiation partners; thus, their activity successfully complement sectoral-level social dialogue, driven by trade unions.

[427] A Tóth, L Neumann and Y Ghellab, 'Works councils examined' (2004) at http://www.eurofound.europa.eu/eiro/2004/01/feature/hu0401106f.htm (last visited on July 23, 2014).

[428] Reforms concerning SZOT started in 1988, and were focusing on two major areas: separation from Party politics and decentralisation.

[429] The relevant decision concerning trade union rights were 8/1990 (IV.23.) ABH and 42/1991 (VI. 23.) ABH (Constitutional Court decision. Here only 8/1990 (IV.23.) ABH is examined in detail. For further analysis see, Cs Kollonay Lehoczky and M Ladó 'Hungary' In. U Carabelli and S Sciarra (eds.), *'New Patterns of Collective Labour Law in Central Europe. Czech and Slovak Republics, Hungary, Poland'* (Milano, 1996, Giuffre Editore) 101–161.

[430] 8/1990 (IV.23.) ABH (Constitutional Court decision).

[431] Interestingly, the President of the State Wages and Labour Office did not consider the disputed provision to be unconstitutional. At the same time he admitted that the provision in question is the product of the former system of management, consequently it is difficult to fit it into the evolving system of the reconciliation of interests. Based on this he concluded only that the disputed provision is discreditable, and that it should be

representation of employees fell within the exclusive competence of the trade union of the related sector has radically changed as part of the political transformation process, and the representation of the employees' interests has now been placed upon a pluralistic basis.[432] Section 15 Paragraph 2 of Act No XXII of 1992 governed two kinds of representation rights of the trade unions. One of which was to represent an employees in issues related to her/his living and working conditions, in the name of and on behalf of employees in the absence of a special authorization. The Constitutional Court did not find the disputed provision unconstitutional either under Article 4 or Article 70/C (1) of the Constitution,[433] but rendered its decision considering the provisions of Article 54(1) of the Constitution on the right of disposal. The right of disposal is an integral part of the right to human dignity declared in as a natural right of which no one may be deprived. The Constitutional Court stated that the right of disposal is a "general right to personhood", which encompasses various aspects of personhood, such as the right to free personal development, the right to free self-determination, general freedom of action or the right to privacy. On the basis of the disputed provision, argues further the Constitutional Court, it may not be ruled out that the trade union may choose to exercise its right of representation in spite of an employee's explicit request to the contrary. The risk of infringing upon the employee's interest is at its greatest when the non-trade-unionist employee's personal matters are concerned. That was the primary reason why the provision in question had to be annulled. Even though it was rightfully claimed that the decision of the Constitutional Court was based on a stereotypical image of socialist-style, paternalistic trade unions alienated from workers, rather than a recognition of genuine trade union functions, from another point of view this decision could be considered as an important step in acknowledging the personal freedom of workers.

The rights of trade unions and works councils regarding information and consultation were not clearly formulated resulting in a rather controversial dual channel model, especially Section 21 Para 2, Section 22 and Section 68 on right information and consultation considered to be confusing by creating different stances for works councils and trade unions at workplaces.[434] Trade union representativeness was tied to the results of the works council election, further enhancing their horizontal interdependence. This regulation, as András Tóth and Carla Frege pointed out, blurred the line between collective bargaining and consultation and gave an opportunity to employers to avoid bargaining with trade unions.[435] The result was first that employers did not have prevailing counterparts at the bargaining table, second, that they were not interested in providing higher standards in employment relationships than the

---

subjected to revision in the new Labour Code at the time when re-regulating trade union rights. The President of the National Federation of Hungarian Trade Unions failed to submit his opinion in time.

[432] Pursuant to Article 70/C (1) of the Constitution (Act No XX of 1949) everybody shall have the right to form an organization with others with the aim to protect their economic and social interests or to join such an organization.

[433] Art 4 provides for the trade unions' right to engage in the protection of interest and representation, which appears also in the former Constitution, to other organizations formed for the protection of interests.

[434] For a detailed analysis on information and consultation rights in Act No XXII of 1992 see, A Tóth '*The Inventions of Works Council in Hungary'* 3 European Journal of Industrial Relations 2, 161-81; and A Tóth, ' Üzemi tanácsok, szakszervezetek és munkáltatók' available at http://econ.core.hu/kiadvany/csopak/7.pdf; especially pages 237 ff.

[435] C Frege and A Tóth 'If *You are Hunted, You Haven't Time to Enjoy the Landscape* Paper for the IV. European Regional Congress of the Industrial Relations Associations. Dublin, 1997; quoted by A Tóth ' Szakszervezetetek…' 247.

minimum requirements of the Labour Code. Thus, collective agreements could not become genuine sources of labour law, and anti-union inclination of employers was generally high. Notwithstanding, researches had controversial findings on the relationship between works councils and trade unions.[436] It was unquestioned on the other hand, that trade unions got works councils under their influence.[437]

The above stated problems had a significant impact on the new Hungarian Labour Code, which came into effect on July 1, 2012. Since the new Labour Code put the provisions of its predecessor into perspective, I will only elaborate on the regulations of 1992 Labour Code in the light of the novelties introduced by its successor.[438]

B Employee Involvement in the New Labour Code

The new Labour Code of Hungary,[439] while generally maintaining the democratic principles of its predecessor concerning works councils, has brought substantive changes to industrial relations.[440] The structure of the Labour Code suggests that the lawmaker intended to emphasise the importance of works councils, even to the detriment of trade unions: many of the former rights of trade unions are now allocated to works councils. Whereas it has to be generally welcomed that the confusion regarding trade union and works council rights of the previous Labour Code is mostly cleared away, the success of the re-codification is not uncontested. Despite the fact that trade union's former information and consultation rights are now delegated to works councils, they are not empowered by the necessary powers to effectively exercise these rights. Before elaborating on the new function of works councils, it is indispensable to revisit some of the general changes introduced by the 2012 Labour Code with regard to industrial relations.

The economic plans drawn up by the government after the landslide victory of the current conservative governing party Fidesz and its politically subordinated ally, KDNP (Christian democrats) emphasise the role of labour regulations in general and collective labour law in particular in economic development and the importance of autonomous regulations in the world of work.[441] However, these sources refer to both individual and

---

[436]M Ladó and F Tóth *'Üzemi tanács: munkaharc helyett munkabéke'* (1994) 11 Mozgó Világ, 19–33; M Ladó and F Tóth (eds) *'Helyzetkép az érdekegyeztetésről. 1990–1994* (Érdekegyeztető Tanács Titkársága, 1996, Phare Társadalmi Párbeszéd Projekt: Budapest); S Kisgyörgy and L Vámos '*Az üzemi tanácsok választásának és müködésének tapasztalatai*' (script) (ÉT-PHARE Szociális Dialógus Program, 1994, Budapest).

[437] L Neumann 'Circumventing Trade Unions in Hungary: Old and New Channels in Wage Bargaining' 3European Journal of Industrial Relations 2, 183-202.

[438] For a very detailed analysis of the dual channel system under Act No XX of 1992 see, A Kun, '*The 'dual' representation of workers at the workplace level in Hungary*' (2009) Studia Iuridica Caroliensia IV, 89-113.

[439] Act No I of 2012.

[440] Regarding collective labour law, the new Labour Code has major detrimental effect on trade unions; however, the analyses of this area would definitely stretch the limits of the current paper.

[441] Points 2, 10 and 11 of the ministerial reasoning; the Hungarian Economic Reform program, the so called 'Széll Kálmán Plan' is available at http://ec.europa.eu/europe2020/pdf/nrp/nrp_hungary_en.pdf, Hungarian Labour Plan is available only in Hungarian at

collective autonomy as new and forward-looking ideas to reform Hungarian labour law. This undistinguished point of reference disregards the historical fact that the strengthening of individual autonomy would rather was a step backwards. It is by and large unquestioned that the origins of labour law dates back to times when the state actor started controlling the autonomy of parties entering to an employment relationship to protect the weaker party, the employee. The reinforcement of collective autonomy would indeed be a progressive idea, much needed to support industrial relations in Hungary. Collective autonomy – as oppose to individual autonomy – is an effective tool to control the unilateral regulating power of employers. It should also be noted that the referred documents consider employee involvement one-sidedly, only as a tool of economic development, and disregard its human right nature.

The other goal of the referred economic plans, to encourage social partners to enter into collective agreements, however, is difficult, if not impossible to achieve through the new Labour Code. Now there are tremendous regulations in the Labour Code which allow collective agreements (and even individual labour contracts) to alter from the Code to the detriment to workers. However, the standards stipulated by the Labour Code are already providing for minimum requirements, any detriments could effectively jeopardize the living standards and the dignity of employees. Trade unions would possibly be not willing to take up negotiations under these conditions.[442]

The lawmakers preference toward works councils over trade unions could be detected in the new regulations allowing works councils to (upon the absence of a representative trade union) to conclude a workplace agreement covering all aspects of a collective agreement bar the issue of wages. However, this regulation signifies a severe misunderstanding on the nature of participation. In the following chapter I elaborate on the major novelties introduced by the 2012 Labour Code on employee involvement.

The ministerial reasoning regarding the changes related to participation rights is rather brief. However, the drafters of the law published an academic review on the new directions of regulation, which could be referred as a standpoint of interpretation, even though some of the ideas were not reflected in the adopted version of the Labour Code.[443] The summary argues that the previous regulatory regime of employee involvement clearly failed. This failure could be explained by the wrong initial concept regarding the dual channel model: the numerous overlaps in trade union and works council rights, which completely lacked solid dogmatic foundations, did not serve the purposes of employee involvement, but only fuelled academic debates. The paper even questions the necessity of the dual channel system and calls for the abolishment of the participation rights of trade unions. [444]

---

http://brdsz54.hu/index.php?option=com_content&view=article&id=249:nemzeti-munkaterv-szell-kalman-terv&catid=84&Itemid=476 (both documents were last retrieved on 20 July, 2014).

[442] For a more elaborated analysis on the perception of the new Labour Code towards individual and collective autonomy see, Cs Kollonay Lehoczky, Kérdőjelek egy vegyes származású újszülött vonásai felett, in A Kun (ed) *Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK, 2011. december 13.* (Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, 2013).

[443] Gy Berke et al, 'Tézisek az Új Munka Törvénykönyve Szabályozási Koncepciójához' (2009) 2 Pécsi Munkajogi Szemle.

[444] Ibid, 157-158.

C Election and Dissolution of Works Council

Before elaborating on the election rules set forth by the new Labour Code, it is important to take a note on the changes related to the representativeness of trade unions. The former Labour Code tied the right of concluding a collective agreement to the results the trade union achieved on works council election. Act No XX of 1992 stipulated that those trade unions were entitled to conclude a collective agreement with the employer, whose candidates had received more than half the votes in the works council election.[445] If more than one trade union maintained a local branch at a given employer, a collective agreement could only have been concluded jointly by all the trade unions, provided that the candidates of such trade unions had jointly received more than half the votes in the works council election. If the above conditions for having the trade unions jointly conclude a collective agreement were not fulfilled, the so called representative trade unions had the right to conclude a collective agreement[446] together, provided the candidates of such trade unions have jointly received more than half the votes in the works council election. If the conditions for having the representative trade unions jointly conclude a collective agreement were not fulfilled either, the trade union whose candidates jointly had received more than sixty-five per cent of the votes in the works council election became entitled to conclude a collective agreement.[447] In that respect, representatives were those trade unions, whose candidates received at least ten per cent of the votes in the works council election.[448, 449]

This mixed system where the trade unions' right to conclude a collective agreement was tied to the results of the works council election was a result of an unfortunate trade-off.[450] This mechanism made the boundaries of collective bargaining and participation blurry. In 2003 (eleven years after the former Labour Code came into effect) a nation-wide study showed, that at workplaces where both trade union and works council operated, majority of the trade union officers believed that works councils ripped off trade unions from the

---

[445] Major changes concerning the rules of the election were introduced by Act No LV of 1995.

[446] Another important right of trade unions related to representativeness was the right to contest any unlawful action taken by the employer (or his failure to act) by way of demurrer if such action directly affects the employees or the interest representation organizations of employees. See, Section 23 of Act No XX of 1992.

[447] If, in the cases set forth in Paras 2 and 3 of Section 33 of Act No XX of 1992, the trade union or the candidates of the trade union did not receive more than half the votes in the works council election, negotiations may be held for the conclusion of a collective agreement, however conclusion of the agreement is subject to endorsement by the employees. The employees shall vote on such endorsement (Section 33 Paras 6-7 of Act No XX of 1992).

[448] If more than one works council was elected at an employer, the results of each works council elections had to be combined for the determination of representativeness. A trade union in which at least two-thirds of the employees of the employer in the same employment group (profession) are members was also construed as representative. See, Section 29 of Act No XX of 1992.

[449] This rule was introduced by Act No XIII of 1993 (Section 7 Para 2).

[450] T Prugberger, A kollektív munkajog intézményei, a munkavállalói érdekképviselet és participációs jogok tartalma, mechanizmusa és érvényesülése a jogharmonizációs jogalkotási követelmények tükrében, in, I Horváth and R Rácz (eds), *Tanulmányok a munkajog jövőjéről* (Budapest, 2004, Denzoprint),75; Kisgyörgy-Pataky-Vámos: Helyzetkép az üzemi tanácsokról (Budapest, 2003, FES); B Benyó, '*Tekinthetjük-e jelentéktelennek a munkavállalók részvételét Magyarországon*' (2003) 47 Munkaügyi Szemle 1-2.

participatory rights, which traditionally belonged to them.[451] It was also argued that due to these regulations, trade unions are only interested in the election, but not in the effective operation of works councils. Such a misconception on the dual-channel system is not uncommon in post-communist countries.[452] However, the Hungarian lawmaker did not help to ease the confusion by creating a clear demarcation line between the function and rights of trade unions and works councils. The new Labour Code abolished the mixed system of trade union representation, which is definitely a change which could be considered fortunate in my views, however, dissent opinions exist. Most notably, Professor Kollonay-Lehoczky argues that the former system ensured that the collective agreements concluded at workplaces could genuinely represent the interest of employees employed at a given establishment.[453]

It ought to be also noted that the Hungarian regulations empower the whole workforce employed by the given undertaking without prejudice to their status of employment to participate in the works council elections.[454] However, in this threshold temporary agency workers are not included. It raises the question that temporary agency workers right to participate is not guaranteed. However, it is argued that temporary agency workers are not employed by the receiving undertaking.[455] Thus, the national regulations have complied with the 'great majority' rule of the European Social Charter, which requires that at least 80 per cent of the employees concerned are guaranteed this right.

i Election and Appointment

Employees could be represented by an employee representative, a works council, a central works council, or – as a new feature of the 2012 Labour Code – by a corporate-level works council.[456] An employee representative or a works council has to be elected if, during half-year prior to the date when an election committee was established, the average number of employees at the employer or at the employer's independent establishment or division is higher than fifteen or fifty, respectively. The number of works council member is proportionate to the size of the division represented by the works council.[457] A division of the

[451] Kisgyörgy-Pataky-Vámos: Helyzetkép az üzemi tanácsokról (Budapest, 2003, FES), 9.
[452] See more on the topic in I Guardiancich (ed) 'Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia' (ILO (EC), 2010).
[453] Cs Kollonay-Lehoczky, Kérdőjelek egy vegyes származású újszülött vonásai felett, in A Kun (ed) *Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK, 2011. december 13.* (Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, 2013).
[454] Section 47 Para 1 of Act No XX of 1992 and Section 239 of Act No I of 2012.
[455] For a more elaborated argument see, G Kártyás, *'Irányelv-tervezet a munkaerő-kölcsönzésről'* (2008) 4 Munkajog – Kérdések és Válaszok.
[456] Section 236 Para 1 of Act No I of 2012.
[457] Three, if the number of employees does not exceed one hundred; five, if the number of employees does not exceed three hundred; seven, if the number of employees does not exceed five hundred; nine, if the number of employees does not exceed one thousand; eleven, if the number of employees does not exceed two thousand; thirteen, if the number of employees is more than two thousand. A new works council member shall be elected if

employer has to be considered independent if the head of the establishment is vested with competence which concerns the works council's rights of participation.[458] This independence, thus, does not require physical (geographical) separation: divisions located at several places could belong to one works councils and, if the employer's representative is vested with one or more competences stipulated by Section 264[459] of the Labour Code, multiple works councils could be elected at the same division. Works councils are elected for terms of five years.[460] The justified expenses incurred in connection with the election of the works council is borne by the employer.[461]

Concerning active election rights, all workers employed by the employer and working at the given fixed establishment have to be entitled to participate in the election of works council members. This latter requirement is a novelty of the 2012 Labour Code, formerly it was only required for eligibility.[462] Members of the works council have to be elected by secret ballot and popular vote. Eligible employees have to have one vote.[463]

Regarding passive election rights, employees nominated as works council members have to have legal competency[464] and must have been employed by the employer – other than newly formed employers – for a period of at least six months, and have to work at the given fixed establishment.[465] Persons exercising employers' rights, those who are relatives of the employer's executive officers or are members of the election committee cannot be elected.[466] For the purposes of electability, employers' rights are construed as entitlement to establish, amend and terminate employment relationships.[467]

Regarding the requirement of having legal competency, at an establishment where only employees with either no or limited legal competency are employed (which is theoretically possible due to Section 212 of the Labour Code), employees would be deprived to exercise their right to information and consultation. Neither the European Social Charter, nor Directive 2002/14 contains any provisions regarding the legal competency of employee representatives; thus, it would be fortunate to think over whether this restriction is really necessary.

A candidate may be nominated by at least ten per cent of the employees eligible to vote or by at least fifty employees eligible to vote, or by the local trade union branch represented at the employer. An election has to be declared valid if more than half of those eligible to vote have participated. To this end, an employee eligible to vote cannot be counted – provided that she/he did not participate in the election – who, at the time of the election, was incapacitated to work due to illness or was on leave of absence without pay.[468]

---

the number of employees and the number of works council members are not consistent with the above provisions for at least six months due to an increase in the number of employees.

[458] Section 236 Para 2 of Act No I of 2012.

[459] See above at the part concerning the operation of works councils.

[460] Section 236 Para 3 of Act No I of 2012.

[461] Section 236 Para 4 of Act No I of 2012.

[462] See, Section 46 and Section 47 Para 1 of Act No XX of 1992.

[463] Section 243 of Act No I of 2012.

[464] See, Section 2:8 of Act No V of 2013.

[465] Section 238 Para 1 of Act No I of 2012.

[466] Section 238 Para 2 of Act No I of 2012.

[467] Established by Para 30 of Section 175 of Act CCLII of 2013, effective as of 15 March 2014.

[468] In the event of an invalid ballot, the election shall be repeated within a period of ninety days. The new election may not be held within a period of thirty days. The second election shall be declared valid if more than

Nomination of candidates has to be construed valid if the number of candidates reaches the number of members that can be elected to the works council.[469] The persons receiving the highest number of votes, or at least thirty per cent of the valid votes are construed as having been elected members of the workers' council.[470] In the event of equality of votes, the length of the employment relationship with the employer has to be taken into consideration. Persons receiving at least twenty per cent of the valid votes are regarded as substitute members of the works council.[471]

To approach the issue of election from a different angle, if there are not enough candidates who received thirty per cent of the valid votes, the works council cannot be established. It means, that the lawmaker actually punishes establishments with 'overly active' employees, as if there are too many candidates running for the office, it could easily happen that the votes are fractured as much that not enough candidates could meet the threshold. This regulation is certainly discouraging.

ii Central Works Council and Corporate-level Works Council

The new Labour Code maintained the option of works councils to form a central works council in case there are more than one works councils operates at an employer.[472] Members of the central works council have to be delegated by the works councils from among their members. Central works council may not have more than fifteen members.[473]

A novelty of the new Labour Code is the introduction of corporate-level works council.[474] Central works councils or, in their absence, works councils may set up a corporate-level works council at a recognized[475] or *de facto* group of companies.[476] Members to such

---

one-third of those eligible to vote have participated. The nominee receiving the highest number of votes, or at least thirty per cent of the valid votes shall be declared an elected member of the works council. If the repeated election is declared invalid, a new works council ballot shall be held after one year at the earliest.

[469] Section 242 of Act No I of 2012.

[470] An election shall be declared invalid if the required number of candidates did not receive thirty per cent of the votes cast. The nominees having received thirty per cent of the votes shall be declared elected members of the works council. A new election shall be held within a period of thirty days to fill the remaining positions. For the new election, new candidates may also be nominated up to the fifteenth day prior to the election. The second election shall be declared valid if more than one-third of those eligible to vote have participated. The nominees receiving the highest number of votes, or at least thirty per cent of the valid votes shall be declared elected members of the works council. Persons receiving at least fifteen per cent of the valid votes shall be regarded as substitute members of the works council. If the repeated election is declared invalid, a new works council ballot shall be held after one year at the earliest.

[471] Section 246 of Act No I of 2012.

[472] Section 250 Para 1 of Act No I of 2012.

[473] Section 250 Para 2 of Act No I of 2012.

[474] Section 251 Para 1 of Act No I of 2012.

[475] Section 3:49 of the Civil Code (Act No V of 2013) defines the notion of recognized group of corporation as a form of cooperation featuring a common business strategy between at least one dominant member that is required to draw up consolidated annual accounts and at least three members controlled by the dominant member under a control contract. A group of corporations may consist of limited companies, private limited-liability companies, groupings and cooperative societies. If a group of corporations is led jointly by several legal persons,

works council have to be delegated by the central works councils or the works councils from among their members. Number of members of the corporate-level works council is limited in fifteen.[477]

The regulations concerning corporate-level works council are aligned with those of the group of companies stipulated by the Civil Code. The rules of cooperation have to be laid down within the group of companies by the works council having the right to adopt decisions relating to employees and by the corporate-level works council.[478] Section 3:50 Paragraph 3 of the Civil Code stipulates that the autonomy of the controlled companies of the group may be restricted in the manner and to the extent specified in the control contract with a view to achieving the common business objective. The control contract has to provide for the protection of the rights of the controlled members, and for the protection of creditors' interests. That provides for that decisions regarding participation are made on the level of the controlling company. General provisions pertaining on works councils apply to a central works council and to a corporate-level works council.[479]

Procedures for informing and consulting employees in a European Works Council were introduced by Act No XXI of 2003 [480] to satisfy the obligation concerning the transposition of Directive 94/45/EC. The Act sets forth regulation regarding the applicability of the Hungarian rules for the election of a works council. The Hungarian rules have to be applied when the central management of a Community-scale undertaking or group of undertaking is located in Hungary. The Hungarian regulations have to be also applied regarding the protection of employee representatives if the registered office of the controlling company is not situated in a Member State, but the management of a fixed establishment or company operating in a Member State and controlled by the central management is situated in Hungary, or a Community-scale undertaking or a group of undertaking has a representative agent in Hungary; or if the Community-scale undertaking or controlled undertaking employing the greatest number of employees in Hungary.[481]

---

they shall enter into an agreement to determine the one enabled to exercise the rights of the dominant member in accordance with the control contract.

[476] If the conditions for the control contract prevail for at least three consecutive years, at the request of either of the parties with legal interest the court may order the de facto dominant member and the controlled companies to conclude the control contract and to apply to the court of registry for the registration of the group of corporations. If a group of corporations de facto operates for at least three consecutive years, the court - at the request of either of the parties with legal interest - shall have authority to apply the regulations governing the relations between the managements of the dominant member and the controlled member even in the absence of a control contract and without being registered as a group of corporations. See, Section 3:62 of Act No V of 2013.

[477] Section 251 Para 2 of Act No I of 2012.

[478] Section 251 Para 3 of Act No I of 2012.

[479] Section 250 Para 3 and Section 251 Para 4 of Act No I of 2012.

[480] Amended by Act No CV of 2011.

[481] Para 4 of Section 1 of Act No XXI of 2003.

iii Dissolution of Works Councils and Termination of Mandate

a Dissolution of the Works Council

The new Labour Code by and large retains the regulations concerning the dissolution of works councils stipulated by its predecessor.[482] However, some important changes should be noted. Firstly, the reasons of dissolution of a works council are partially changed. The works council has to be dissolved a) if the employer is terminated without succession; b) if the condition under Subsection (2) of Section 236 no longer applies; c) if its mandate expires; d) upon resignation; e) if it is dismissed; f) if its membership decreases by more than one-third; g) if the number of employees drops below fifty or decreases by at least two-thirds; h) if the results of the election were annulled by the court; and i) in all other cases prescribed by law.[483]A ballot has to be held with regard to the dismissal of a works council, if so proposed in writing by at least thirty per cent of the employees eligible to vote. The ballot has to be declared valid upon the participation of more than half the employees eligible to vote. More than two-thirds of the valid votes are required for dismissal. The provisions pertaining to the election procedure have to be applied to the dismissal of a works council.[484]

A new regulation is that a motion for dismissal may not be filed for the second time within a period of one year.[485] The more precise wording of Section 254 guarantees the continuity of the operation in case the mandate of a works council is dissolved on the grounds specified in Paragraphs *b)-c)* and *f)-g)* of Section 252. Upon such event the old works council remains in force until the new works council is elected, or for up to three months from the time of dissolution.[486]

b Termination of Mandate

The regulations on termination of the mandate of a works council member did not change substantially. The mandate of a works council member has to be terminated *a)* if the member loses her/his legal competency; or *b)* upon dissolution of the works council; *c)* if the member becomes a relative of an executive of the employer; *d)* upon resignation; *e)* upon dismissal.[487]

---

[482] Sections 55-58 of Act No XX of 192.
[483] Section 252 of Act No I of 2012.
[484] Section 253 Paras 1 and 4 of Act No I of 2012.
[485] Section 253 Para 3 of Act No I of 2012.
[486] See Section 56 Para 1 of Act No XX of 1992: If the workers' council is dissolved on account of the reasons set forth in Paragraphs c)-g) of Subsection (1) of Section 55, an employee representative or a workers' council shall be elected within three months following such dissolution.
[487] Section 255 of Act No I of 2012.

These regulations are in line with those of the eligibility for being elected set forth by Section 238 Paragraph 2.

Regarding dismissal, a ballot has to be held with regard to the dismissal of a works council member if so proposed in writing by at least thirty per cent of the employees eligible to vote. The ballot has to be declared valid upon the participation of more than half the employees eligible to vote. More than two-thirds of the valid votes are required for dismissal. A motion for dismissal may not be filed for the second time within a period of one year. The provisions pertaining to the election procedure have to be duly applied for the dismissal of a works council member.

A novelty in the regulations is that upon termination of the mandate of a works council member, an substitute member has to be appointed according to the ranking by the number of votes received.[488]

c Merger, Demerger and Transfer of Economic Entities

Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses stipulates that in case the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer has to be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled. However, this provision does not supply if, under the laws, regulations, administrative provisions or practice in the Member States, or by agreement with the representatives of the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled. Where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority, Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees. If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States has to take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice. Moreover, if the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives have to continue to enjoy the

[488] Section 257 of Act No I of 2012.

protection provided by the laws, regulations, administrative provisions or practice of the Member States.[489]

The new Hungarian Labour Code maintains to satisfy the above requirements[490] by stipulating that upon a merger of economic entities or, if there is a works council operating in each one of the entities, a new works council have to be elected within three months from the date of merger. If only one of the entities in question has a works council, works council member have to be elected within three months for providing representation to the unrepresented employees of the other entities. Upon the demerger of economic entities, a works council has to be elected for the new economic entities within three months from the date of demerger.[491] These measures apply respectively in case of transfer of enterprise.[492]

D Competencies and Responsibilities of Works Councils

Substantive changes were introduced concerning the role of works councils. While the general provisions related to Chapter XX on Works Councils suggests – in line with the relevant section of the ministerial reasoning – that the function of works council is to promote cooperation between employers and employees and to facilitate participation in decision making,[493] Section 262 Paragraph 1 providing for the powers and responsibilities of works councils states that the role of works councils is to monitor compliance with the employment regulations. The ministerial reasoning further explains that this change in the new Labour Code is justified by "international standards."[494] It is regrettable, however, that the ministerial reasoning does not specify which international standards are being referred to, as works councils are traditionally the instruments of participation[495] and they rights generally do not enable them to effectively control employers' practices, which would require powers dissuasive enough to prevent employers from malpractice.

Moreover, the protection of works council members was narrowed down, and it is only the chairperson of a works council who is protected against unfair dismissal. This regulation is suitable to effectively withhold regular works council members to stand up for workers' rights.[496] This issue will be further elaborated later in this chapter.

As it was pointed out, the compromised solution of the Labour Code of 1992 was unnecessarily blurred the lines between the powers and responsibilities of trade unions and works councils by providing rights of information and consultation to both. Now these rights are solely vested in the works councils. However, it ought to be noted that trade unions are

---

[489] Art 6 of Council Directive 2001/23/EC, Official Journal L 082, 22/03/2001 P. 0016 – 0020.
[490] The implementation of the EU Directives was first made by Act No XIV of 2001.
[491] Section 258 of Act No I of 2012.
[492] Section 258 Paras 3-4 of Act No I of 2012.
[493] Section 235 Para 1 of Act No I of 2012; ministerial reasoning concerning Sections 235-37 of the Labour Code.
[494] Ministerial reasoning concerning Section 262 of the Labour Code.
[495] C Barnard, European Labour Law (Oxford, 2012, OUP) 659.
[496] Remedies related to this protective rule will be discussed later within this chapter.

traditionally in a better position to monitor employers' practices and working conditions, as works councils are instruments of mutual cooperation and participation in decision making.

i Information and Consultation Rights

Section 262 Paragraph 2 provides for that to the extent required for their responsibilities, works councils are entitled to request information and to initiate negotiations, with the reason indicated, which the employer may not refuse. The notion of information is provided for by Section 233. For the purpose of Part III, 'notification' means transmission of information specified by law as related to industrial relations or employment relationships in order to enable the recipients to acquaint themselves with the subject matter and to examine it, and to formulate an opinion to prepare for consultations, and 'consultation' means the establishment of dialogue and exchange of views between the employer and the works council or trade union.[497] These definitions are the same as provided for by Directive 2002/14/EC, which is referred by the ministerial reasoning.[498]

To the extent required for their responsibilities, works councils is entitled to request information and to initiate negotiations, with an indication on its reason. The employer must not refuse the initiative of the works council. Even without special request of the works council, the employer has to provide information to the works council in every six month on matters affecting the employers economic standing; changes in wages, liquidity related to the payment of wages, the characteristic features of employment, utilization of working time, and the characteristics of working conditions; the number of workers in employment and the description of the jobs they perform.

Paragraph 2 of Section 233, which states that "[c]onsultation shall take place with a view of seeking an agreement, in such fashion as consistent with the objective thereof and ensuring: *a)* that the parties are properly represented; *b)* the direct exchange of views and establishment of dialogue; *c)* substantive discussions." Regarding the issue of timing, the only specification is provided for by Section 264 Para 1 of the Labour Code stating, that employers have to consult the works council at least 15 days prior to passing a decision in respect of any plans for actions and adopting regulations affecting a large number of employees. The quality of the dialogue is supposed to be further protected by the provisions of Paragraph 3 of Section 233, which prohibits the employer to carry out the proposed action during the time of consultation, or for up to seven days from the first day of consultation, unless a longer time limit is agreed upon. In the absence of an agreement the employer has to terminate consultation when the said time limit expires.

The scope of the plans or actions that requires consultation especially covers the following matters: proposals for the employer's reorganization, transformation, the

[497] Section 233 Para 1 Points a) and b).
[498] Article 2 Points (f) and (g) of Directive 2002/14.

conversion of a strategic business unit into an independent organization; introducing production and investment programs, new technologies, or upgrading existing ones; processing and protection of personal data of employees; implementation of technical means for the surveillance of workers; measures for compliance with occupational safety and health requirements, and for the prevention of accidents at work and occupational diseases; the introduction and/or amendment of new work organization methods and performance requirements; plans relating to training and education; appropriation of job assistance related subsidies; drawing up proposals for the rehabilitation of workers with health impairment and persons with reduced ability to work; laying down working arrangements; setting the principles for the remuneration of work; measures for the protection of the environment relating to the employer's operations; measures implemented with a view to enforcing the principle of equal treatment and for the promotion of equal opportunities; coordinating family life and work; other measures specified by employment regulations.[499]

Both the ministerial reasoning and the Commentary of the Labour Code[500] emphasise the importance of confidential information. According to Section 234 Paragraph 1, the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation covers facts, information, know-how or data that, if disclosed, would harm the employer's legitimate economic interest or its functioning. Paragraphs 2 and 3 of Section 234 mirror employers' prerogative as the obligation of the employees' representatives, stating that the representatives acting in the name and on behalf of works councils or trade unions are not authorized to disclose any facts, information, know-how or data which, in the legitimate economic interest of the employer or in the protection of its functioning, has expressly been provided to them in confidence or to be treated as business secrets, in any way or form, and are not authorized to use them in any other way in connection with any activity in which this person is involved for reasons other than the objectives specified in the Labour Code. Any person who is acting in the name or on behalf of the works council or trade union has to be authorized to disclose any information or data acquired in the course of his activities solely in a manner which does not jeopardize the employer's legitimate economic interest and without violating rights relating to personality.[501]

The notion of 'business secret' or, in the wording of the new Civil Code, 'trade secret' is defined by Section 2:47 of the (new) Civil Code.[502] Trade secret includes any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if published or disclosed to others are likely to imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets, provided the lawful owner is not subject to actionability in terms of keeping such information confidential. Commercial secrecy has to also apply to technical, economic and other practical knowledge of value held in a form enabling identification, including accumulated skills and experience and any

[499] Section 264 of Act No I of 2012.
[500] K Kardkovács (ed), *Az új munka törvénykönyvének magyarázata* [Commentary on the New Labour Code] (Budapest, 2012, HVG-ORAC), 433.
[501] Amended by Point e) of Para 34 of Section 175 of Act No CCLII of 2013 in accordance with the new Civil Code.
[502] Act No V of 2013.

combination thereof, if acquired, used, disclosed or published in violation of the principle of good faith and fair dealing. It is noteworthy that according to Paragraph 3 of Section 2:47, the breach of commercial secrecy has to not be relied on as against a person who has obtained trade secrets or know-how from third parties in good faith, in the course of trade for consideration. These regulations are in line with the provisions of Article 6 of Directive 2002/14/EC, Article 8 of Directive 2009/38/EC as well as Article 21a of the Revised European Social Charter, which allow employers to withhold certain information which could be prejudicial to the undertaking or which are confidential.

ii Co-determination

The new Labour Code brought significant changes related to works councils' co-determination right. Firstly, the subject area of co-determination was curtailed. Section 263 stipulates that the employer and the works council make decisions jointly concerning the appropriation of welfare funds. Whereas the previous Labour Code provided co-determination right to works council related to the appropriation of welfare funds, and *the appropriation of welfare institutions and real estate property of such nature*, as specified in the collective agreement.[503] Thus, the new Labour Code eliminated the co-determination right concerning the appropriation of welfare institutions and real estate property, and it ceased to link these rights to the provisions of the collective agreement effective on a workplace. On one hand, the limitation of the subject matter is not explained by the ministerial reasoning, and, in my views, it was not justified by the case law related to the previous Labour Code either. On the other hand, ceasing the linkage with the provisions of the collective agreement should be welcomed.

First, because it clears the boundaries between trade unions and participation. Second, Section 65 of the previous Labour Code led to controversial interpretations. The question referred to the court in case EBH 2004.1148 was, whether the works council had the right of co-determination related to the utilization of welfare-related real estate property in the absence of a specific provision of a collective agreement. The Court's decision was in the affirmative. However, when Section 65 of Act No XXII of 1992 was amended in 2007,[504] it became clear that the lawmaker interpreted this question in a manner contrary to the quoted ruling of the Supreme Court. Act No XIX of 2007 did not amend the text itself, but edited the existing sentence that changed the interpretation in a way that the works council *shall not*

[503] Section 65 Para 1 of Act No XXII of 1992, amended by Section 1 of Act No XIX of 2007. In 1992 the Labour Code originally provided co-determination right to works councils to the adaption of the health and safety regulations, however, the related provisions were incorporated in Act No XCIII of 1993 on Employment Safety and Health. This amendment was controversial, as the provisions of Act No CXIII of 1993 did not make the election of a health and safety committee compulsory; thus, in case the employer did not agree with the election of such committee, the works council would have no right of co-determination on safety and health issues. For a more detailed analysis see T Prugberger, op cit, 76 ff.

[504] Section 1 of Act No XIX of 2007.

have the right to co-determination in the absence of specific provisions on the subject matter laid down by a collective agreement.

Secondly – and more importantly – the legal consequences of the breach of the works council's right on co-determination were changed. While the previous Labour Code deemed any action taken by an employer violating the co-determination rights void,[505] the new Labour Code does not stipulates so.

As no explanation is given by the ministerial reasoning for the change, an inspiration to make such a substantive change on the sanction could be found in the highly politicized ruling of the Labour Court in the Budapest Airport case, which delayed its privatization process.[506] The former Labour Code stipulated that employers' measures which violated the co-determination or consultation rights of the works council were void. In the Budapest Airport case the Court had to decide whether the transaction related to the privatisation of Budapest Airport and ruled the transaction void because the management had failed to consult properly the works council under Section 65 Para 3 of Act No XXII of 1992.

The privatisation process in Hungary started in the late 1980s; however, companies with certain strategic importance remained to be owned by the Hungarian state, for example those being vital for public transportation, like the Budapest Airport Co (Budapest Airport Rt). The Privatisation Act required that at least 25 per cent plus one share of Budapest Airport remain in state ownership. Nevertheless, the Hungarian Privatisation and State Holding Company (Állami Privatizációs és Vagyonkezelő Rt, ÁPV Rt.) decided to sell the shares of Budapest Airport over this limit, issued a call for tenders in June 2005 and shortlisted the potential buyers.

The works council of Budapest Airport challenged the privatisation at the labour court on grounds that – among other complaints – the works council had not been informed or consulted appropriately on the privatisation tender, therefore the transaction had been void. The court upheld the works council's claim. In its ruling, the court referred to Section 65 of the Labour Code of 1992, which required employers to consult the works council prior to taking a decision in respect of plans affecting a large group of employees, including the employer's privatisation. Section 67 of that Labour Code stipulated that any action by an employer in breach of the provisions of Section 65 is void.

The ruling triggered controversial comments in both business and academia. Those who disagreed with the Court's decision argued that the Labour Code did not specify any obligations for the employer's owner regarding the duty of consultation, even if the decision or the action influences the working conditions of the employees. The Labour Code stated that the power to inform and consult the works council was vested in the employer, not in the owner, regardless of the entity of the decision maker, therefore an action of the owner of the employer (in this case ÁPV Rt.) could not be deemed void under Sections 65 and 67 of the Labour Code of 1992. Another legal argument was that the Labour Court did not have the competence to decide on civil law issues, such as the validity of a privatisation tender.

---

[505] Section 67 of Act No XXII of 1992. For a more detailed analysis on the void measures of employers see, T Gyulavári and A Kun, *'Munkáltatói jogalkotás? A munkáltatói szabályzatok szerepe a munkajogi szabályozásban'* (2012) 3 Magyar Jog, 157-69.

[506] Ruling of the Municipal Labour Court No 2.Mpk. 50.329/2005/9-I.

Despite of the criticism, the ruling in the Budapest Airport case was considered as a landmark decision, reinforcing the strongest power of works council, the right for co-determination. Arguments in favour of the labour court's ruling emphasised that participatory rights must be enforceable in all cases, including commercial transactions. Nonetheless, those sections of the Labour Code having transposed the EU Directive on transfers of undertaking refer clearly to the superior organisations' decision making and maintains the information and consultation duty of the management. Moreover, Act No XXXIX of 1995 on Privatisation also stipulated detailed procedural rules for information and consultation. Previous court rulings related to selling companies' social welfare facilities were also cited, as examples for the co-determination right of works councils in civil law matters. After all, the Courts of Appeal [507] upheld the decision of the Labour Court. [508] Having regard to the changes introduced by the 2012 Labour Code it is doubtful that the Court would rule the same today in the Budapest Airport Case, as the works council could only file a claim to state that the employer's action violated the right of co-determination, the Court most probably would not deem the action void.

Formerly, the content of the co-determination was also heavily debated. Most notably it was questioned whether the works council had co-determination right with regard to the sales of a welfare property. The law stipulated that the works council had co-determination rights concerning the *utilization* of welfare-related real estate property. [509] Irén Tatár argued that the right to sell in its nature is a different, yet superior right compared to the right to utilize, thus, the co-determination right of works councils did not covering this area.[510] In contrast, Tamás Prugberger argued that the income resulted from sales is a specific form of utilization, thus it was involved in the scope of co-determination.[511]

However, the issue of the legal consequences of the breach of the works council's right on co-determination is striking. Without dissuasive sanctions and proper remedies, participation rights are not safeguarded. In general there are two types of enforcement methods used by Contracting Parties of the European Social Charter under Article 21: administrative fine and nullity of the employer's decision violating the rights of information and consultation. It is worth to remember here again, that the European Committee of Social Rights found that Moldova is not in conformity with Article 21 of the Revised Charter regarding the sanctions applicable in case the employer fails to fulfil its obligation to inform and consult employees within the undertaking.

The former Labour Code of Hungary stood on the ground of nullity. However, as the relevant case law demonstrates, the interpretation of nullity was heavily contested. Undoubtedly, the meaning of nullity is hard to understand in many cases. For example, what would be the decision in a theoretic case when the employer makes unilateral decision over

---

[507] It was ruled by the then Municipal Court (Fővárosi Bíróság).

[508] Eventually, the repeated tender was won by BAA International Ltd, the value of the bid was 464.5 billion HUF (around 1.5 billion EUR). For a more detailed explanation on the lawsuit see, G T Fodor and L Neumann at http://www.eurofound.europa.eu/eiro/2005/09/feature/hu0509101f.htm

[509] Section 65 Para 1 of Act No XX of 1992.

[510] T Prugberger, R Tománé Szabó and I Tatár, *Az üzemi és közalkalmazotti tanács Nyugat-Európában és Magyarországon* (Budapest, 1994, MOSZ).

[511] T Prugberger, A kollektív munkajog intézményei, a munkavállalói érdekképviselet és participációs jogok tartalma, mechanizmusa és érvényesülése a jogharmonizációs jogalkotási követelmények tükrében, in, I Horváth and R Rácz (eds), *Tanulmányok a munkajog jövőjéről* (Budapest, 2004, Denzoprint), 77.

the welfare fund – say, purchases music concert tickets for the employees? In case of nullity, what would be the consequences of infringing the co-determination right of the works council? Should the employer take back the tickets? What would happen if, by the time the court rules the case, the music concert is already over? Should the money spent on the tickets be paid back, even though the employees enjoyed the concert, despite they had wished to listen to different genre of music or to have meal vouchers instead?

Imposition of an administrative fine would make the situation easier to understand. However, monetising the breach could easily lead to malicious employment practices, as it would be easier to treat the potential fine as an additional cost item during the decision-making process. It is also argued, that the most severe punishment for a business is when the decision-making process needs to be repeated in a relatively short timeframe, therefore it is more dissuasive than fines. This is well demonstrated by the Budapest Airport case. Regarding the nature of the subject matter of consultation rights,[512] I believe that a system which contains both of the elements, nullity and an administrative fine would serve the interest of employees the best. Labour courts could be entitled to decide which sanction to be imposed based on the nature of the violation.

E Workplace Agreement

One of the most contested collective labour law related regulations of the new Labour Code is that works councils are now enabled to conclude a workplace agreement in subject matters designated to collective agreements, except the issue of wages. Such workplace agreements may be concluded on condition that the employer has not concluded a collective agreement covering the given workplace, or there is no representative trade union at the employer which is entitled to conclude a collective agreement.

The reason why this regulation signifies a severe misconception on the nature of employee participation and works councils could be summarized as follows. Even though works councils represent employees' interest, they are not a part of the collective bargaining process, but are instruments of employee involvement in decision making. Collective bargaining transforms decision making processes and the collective agreement, as a result of the bargaining, merges the will of the two contracting parties. In contrast, through participation the decision making process becomes more democratic, yet the decision itself will remain a unilateral act of the employer. [513] It is especially true in the case of the Hungarian works councils which do not possess as strong competences as their counterparts in Germany or in Austria.[514] Moreover, works councils have a nature of a public law, rather

[512] Section 264 Para 2 of Act No I of 2012.
[513] See, Cs Kollonay Lehoczky, Kérdőjelek egy vegyes származású újszülött vonásai felett, in A Kun (ed) *Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK, 2011. december 13.* (Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, 2013).
[514] It shall be also noted that in the case of the Weimar works councils, the right to monitor was introduced to keep soviets outside of the workplaces; see Part II Ch 1.

than a private law instrument, which was not denied by the lawmaker either.[515] Thus, works councils could never become contractual partners of employers.

This is not the first time that this misconception appears in the Hungarian Labour Codes. Firstly, as it was discussed in length in a previous chapter, the labour law regulations of the state socialist era empowered trade unions with participatory rights, which resulted in a confusion regarding the roles and responsibilities of the two institutions. Secondly, an amendment of the 1992 Labour Code introduced a similar solution in 1999, which was eventually taken out from the Labour Code in a relatively short time. Originally workplace agreement was introduced by an amendment of the Labour Code in 1995, which allowed works councils and employers to conclude an operative agreement on issues pertaining to the rights of a works council and its relations with the employer.[516] This scope was largely extended by the radical changes of Act No LVI of 1999. The amend allowed employers and works council to regulate issues, in the absence of trade union representation at the workplace, which were subject matters of a collective agreement. Both the general and the specific parts of the ministerial reasoning remained silent on the reasons why such a drastic amendment was necessary. The Hungarian trade unions did not find the matter justifiable either. They argued that works councils were not meant to be protecting employees' interest against the employers, and they were defenceless at the bargaining table as they lacked the necessary toolkit to pressurize the employer, most importantly, works councils were (and still are) not allowed to organize a strike.[517] Such workplace agreements were repealed once a collective agreement effective on the workplace was concluded.

On one hand, Act No LVI of 1999 introduced an instrument fundamentally alien from the newly established Hungarian works councils. Such a measure revoked the state-socialist mechanism which had put trade unions in similar shoes, whereby they had been supposed to represent employees' interests against that of the employer's and at the same time, to exercise their participatory rights. On the other hand, the amendment restricted the scope of unilateral decisions of employers in issues like working time banking, the order of work,[518] matters pertaining the employees' health, culture or welfare, as well as improvement of their living conditions. In the absence of a collective agreement, these areas were subject to internal rules, unilaterally drawn up by the employer. Thus, workplace agreement might have been able to increase employee control over these issues. However, due to the continued contest of trade unions, the concerned regulations were taken out from the Labour Code – as silently as they were introduced – by Act No XIX of 2002.[519]

To distinguish between the right to bargain collectively and the right to participate, the principal differences between Articles 6 and 22 of the Revised Social Charter ought to be also

---

[515] Point 2-4 of the ministerial reasoning states that the provisions of Rome I cannot be applied in the case of employee participation, as these regulations are not based on private law. Similar opinion was formed by Gy Kiss, Gy Berke, Z Bankó and E Kajtár, *A munka Törvénykönyve hatása a gazdasági versenyképességre* (as a part of TAMOP 2.5.2 program, 'A partnerség és a párbeszéd szakmai hátterének megerősítése, közös kezdeményezések támogatása', Pécs, 2010), 211 ff.

[516] Section 64/A of Act No XX of 1992.

[517] Works councils had to remain unbiased in relation to a strike organized against employers. Consequently, they could neither organize a strike, nor could support or impede a strike. The term of works council members participating in a strike were suspended for the duration of the strike. See, Section 70 of Act No XX of 1992.

[518] Section 119 of Act No XX of 1992.

[519] Section 14 Para 4 of Act No XIX of 2002, effective of 2 July, 2002.

mentioned. Despite of the overlap of their material scope, there are substantial differences in their stances. The consultation process set forth by Article 6.1 of the Charter with relation to the right to bargain collectively does not establish any rights or duties; it refers to an exchange of views of parties on an equal footing in a situation where the conflicting interest of the bargaining parties are to be confronted. In contrast, Article 22 of the Charter grants an enforceable right to consultation to workers in a vertical, unequal situation, where the managerial prerogatives of an employer are recognized.[520]

As Kollonay well summarises the new situation, instead of increasing the terrain of collective autonomy, the right of works council to conclude such workplace agreements is nothing more than a rubber stamp on the unilateral action of employers to drawn up working conditions.[521] Not to mention, the model of vesting participatory and bargaining rights in such way solely to one party has already failed, in fact, twice in the history of Hungarian Labour Law.

F Remedies

The protection of workers' representatives was first safeguarded by ILO Convention No 135. According to its provisions, workers' representatives in the undertaking have to enjoy effective protection "against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements." The Convention further specifies the term workers' representatives, it means "persons who are recognised as such under national law or practice, whether they are (…) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned."[522]

This notion was adapted by the European Social Charter: "[w]ith a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking: they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking." [523] The same requirement appears in Directive 2002/14/EC: "Member States shall ensure that employees' representatives, when carrying out

[520] For a more detailed analysis on the differences and similarities of Articles 6 and 22, see, Cs Kollonay Lehoczky (n …), 6-8.
[521] See, Cs Kollonay Lehoczky, Kérdőjelek egy vegyes származású újszülött vonásai felett, in A Kun (ed) *Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK, 2011. december 13.* (Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, 2013).
[522] C135 - Workers' Representatives Convention, 1971 (No. 135), Articles 1 and 3b.
[523] Article 28 of the Revised European Social Charter.

their functions, enjoy adequate protection and guarantees to enable them to perform properly re duties which have been assigned to them."[524]

All of the above mentioned instruments state that the protection is due to the effective exercise of the right of workers' representative to carry out their function. This notion has utmost importance regarding the new Hungarian Labour Code. The former Labour Code provided protection against unfair dismissal of all trade union officers and works council members without prejudice to their positions within the trade union organization or the works council respectively. However, the new Labour Code unnecessarily narrows down the scope of protection to a specified number of trade union officers and to the chairperson of the works council. Section 26 Paragraphs 3 and 4 stipulate that the works council's consent is required for terminating the employment relationship of the chairperson of the works council by notice, or for temporary reassignment.[525] If the works council does not agree with the proposed action, the statement shall include the reasons therefore. Failure by the works council to convey its opinion to the employer within the above specified time limit shall be construed as agreement with the proposed action.

The new provisions are not satisfying the requirements set forth by the ILO, the European Social Charter and the EU Directive, because all members of the works councils are actual employee representatives, not only the chairperson of the works council, therefore, they would deserve the same level of protection.

The Labour Code allows employees, employers and local trade union branches represented at the employer to bring an action in connection with the nominations, the procedure and the result of the works council elections.[526] The court hears the case within fifteen days in a non-litigious proceeding. The decision of the court may be appealed within five days from the date of delivery of the decision; in this case the court of the second instance delivers its decision within fifteen days. In its decision the court could annul the results of the election if it finds any substantive infringement of the relevant procedural regulations, meaning that the infringement might have had an impact on the outcome of the election.[527] It follows from this provision that in case the complaint does not related to issues of nomination, election procedures, or result of the election, it is regarded as conflict of interest; therefore, it cannot be a subject matter of a lawsuit.[528]

In a recent case the Curia judged that claims related to the alleged infringement of the procedural rules of the election have to be filed separately in each and every action during the election and that the 5-day deadline is also counted separately in these cases. In the same lawsuit the Curia also judged that Section 249 Paragraph 2 only provides for cases when the results of the election could be repealed.[529] The question that might arise is that if the Court does not annul the results of the election, what would be an impact of a decision which merely states the violation of the procedural rules?

---

[524] Art 7 of Directive 2002/14.
[525] Section 53 of Act No I of 2012.
[526] Section 249 Para 1 of Act No I of 2012.
[527] Section 249 Para 2 of Act No I of 2012.
[528] Supreme Court Decision No BH 2013.79 (the decision was based on Section 43 Paras 1 and 3 of Act No XX of 1992).
[529] Curia Decision No EBH2014. M.13.

G Information and Consultation Rights in case of Collective Redundancies and Transfer of an Undertaking

As it was discussed above, the new Labour Code designates information and consultation rights to works councils. However, there are two areas in particular when this solution raises concerns regarding the effectuality of information and consultation rights. More precisely, in the collective redundancy and transfer procedures employees are (to different extent) deprived of their information and consultation rights in the absence of works council.

Regarding collective redundancies, Section 72 Paragraph 1 of the Labour Code stipulates that in case the employer is planning to carry out collective redundancies, it shall initiate consultation with the works council. The negotiation may lead to an agreement;[530] however the employer's duty of consultation does only due up to 15 days from the initiation of the consultation. The Labour Code only refers to the content of the agreement in one aspect, namely that it may contain the scope of workers affected by the termination of employment relationships,[531] and it does not refer to any sanction or remedies may due upon the infringement of the agreement, eg, a termination of an employee against the rules accepted by the parties.[532] However, this agreement ought to be considered as a workplace agreement, and its violation has to have the legal consequence of unlawful termination.[533] This assumption however, is rather weak as a possible remedy.

Concerns arise with regard to cases when there is no works council operating at an establishment in question. Since the Labour Code only refers to the duty of consultation with the works council, strict interpretation of the text suggests that in absence of works council, notwithstanding, even a trade union is present at the establishment, there is no such obligation on the employer's side.

Directive 98/59/EC provides for that workers' representatives means the workers' representatives provided for by the laws or practices of the Member States.[534] This notion is rather vague, allowing Member States to interpret it in line with their national industrial relations' traditions. At the first glance, EU law does not inspire Member States to create new forms of representation system, but the case law of the Court of Justice of the European Union specifically made mandatory for the United Kingdom to establish adequate representation for workers where it had not been existed with regard to collective redundancies.[535] The Court set forth that,

> [the Directive 77/187/EEC on transfers of undertaking] require[s] Member States to take all measures necessary to ensure that workers are informed, consulted and in a

[530] See Article 2.1 of Directive Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal L 225, 12/08/1998 P. 0016 – 0021).
[531] Section 76 Para 1 of Act No I of 2012.
[532] Act No XXII of 1992 specifically invoked the consequences of unlawful termination is such cases; see, Section 94/F Para 1 of Act No XXII of 1992.
[533] On a similar opinion T Gyulavári (ed) Munkajog [Labour Law] (Budapest, 2013, Eötvös Kiadó), 228-229.
[534] Article 1b of Diretive 98/59/EC.
[535] *Commission v United Kingdom*; see, Case C-382/92 and Case C-383/92 [1994] ECR I-2453, 2479.

position to intervene through their representatives in the event of collective redundancies [or the transfer of undertaking].

Member States' laws and practices for the designation of workers' representative must ensure that they are able to sufficiently protect employees' interest under circumstances like collective redundancies or transfers.[536] Thus, the aim of the regulation is to provide adequate voice for workers during these procedures. The Hungarian Labour Code clearly fails to achieve this goal. As argued above, the right to information and consultation is an individual right and employee representatives are to facilitate the process. Even in the absence of a standing body, individual employees shall not be deprived of their basic right to gain information concerning a workplace, especially regarding issues severely and possible disadvantageously affecting their employment, such as collective redundancies. A possible solution to overcome this shortcome would be that trade union officers or, in the absence of a trade union at the establishment, ad-hoc representatives elected by all employees employed at a given establishment could take up the task to negotiate with the employer.

A similar gap concerning information and consultation right could be detected with regard to the regulations of transfer of an undertaking. Section 38 Paragraph 2 provides for that in case of transfer of undertaking, the employer needs to inform employees in writing about the date or proposed date of the transfer, the reason of the transfer, the legal, economic and social implications of the transfer concerning employees, and any measures envisaged in relation to the employees. However, Section 264 Para 1 stipulates that the employer is required to consult the works council 15 days prior to the decision making regarding any plans for actions and adopting regulations affecting a large number of employees; whereas Para 2 point b) specifically mentions transformation and reorganisation of the business as such.

Again, this regulation means that in the absence of works council, employees are not consulted, only informed, about the employer's decision.[537] On an analogous way to the above reasoning, the Labour Code violates Directive 2001/23/EC on the transfers of undertakings, businesses or parts of undertakings or businesses does not provide for adequate protection of workers during the transfer if there is no standing body elected. Also, it is a mystery, why trade unions are not referred by the law with regard to the procedure of transfer as possible representatives of employees. Thus, a revision of the regulation would be necessary, providing for that trade union officers or, in the absence of a trade union at the establishment, ad-hoc representatives elected by all employees employed at a given establishment have to be consulted by the employer with regard to the issues related to the transfer of undertaking.

---

[536] B Bercusson, European Labour Law (Cambridge, 2009, CUP), 63.

[537] Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings Article 2c provides for that "representatives of employees" and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States (Official Journal L 082 , 22/03/2001 P. 0016 – 0020).

III Interim Conclusions

The Research question I tried to answer in the chapter was (Q6) *whether the provisions of the new Hungarian Labour Code comply with the European norms, such as the European Social Charter and Directives 2002/14/EC and 2009/38/EC?* The new Labour Code successfully cleared away most of the confusion originated in the horizontal dual channel model of Act No XXII of 1992; however, my findings concerning the rights of works councils are rather negative.

The new Labour Code clearly favours the instruments of employee participation to those of collective bargaining. However, the preference of the lawmaker is by and large exhausted in declarations and, in fact, works councils do not possess stronger rights than before. The preferential treatment of works council come across not as empowering the works councils with more right, rather, as a weakening of the trade unions while works councils remains the 'diluted' version of the German model, having no considerable power. I would summarise the problematic parts of the new Labour Code as follows.

There is a fundamental misconception of works council to state that the function of works council is to monitor the compliance of employers' practices with the employment regulations. The existing rights of works council are not sufficient to provide effective control over employers. The protection of employee representatives is not sufficient. Whereas it is uncontested that 'regular' members of works council deemed employee representatives (for example the regulations concerning confidential information are binding on them), only the chairperson is protected against unfair dismissal. This practice obviously goes against the requirements set forth by Directive 2002/14 and violates Article 22 of the European Social Charter as well as the provisions of ILO Convention No 135.[538]

Even though the scope of consultation was enlarged compare to that of the previous Labour Code, the right of co-determination was curtailed. The available remedies are not as effective as they were before. The new Labour Code introduced substantial changes to the system of remedies in case an employer violates the right of consultation or the right of co-determination of works councils. While the former Labour Code rendered these unlawful actions void, the rule of thumb of the new Labour Code has changed. If an employer violates the rights to information and consultation, a works council could initiate a non-litigious proceeding within five days of the alleged infringement of its consultation or co-determination rights. The Labour Court decides the case in 15 days. The sanctions related to the unlawful practices of employers, eg, the violation of information, consultation and co-determination rights are not dissuasive enough to prevent the malpractice of employers.

As Professor Kollonay argues, sanctions and remedies are indispensable instruments and "a *sine qua non* of the information and consultation rights as genuine and enforceable human rights."[539] Forth, without dissuasive sanctions and proper remedies, the right to conclude a workplace agreement covering subject matters of a collective agreement is not a sign of empowerment of works councils, but a rubber stamp on the workplace rules unilateral

[538] Hungary ratified ILO Convention No 135 in 1972.
[539] Kollonay, Fundamental…, 30.

drawn up by employers. Thus, I would highly recommend restoring the provisions of the former Labour Code regarding two issues. One is the nullity of employers' measures which are adopted with the violation of the co-determination right of the works councils. I would even prefer to extend this sanction with regard to the violation of consultation rights. I believe that imposing a fine (which is a common sanction in other EU Member States, as it was discussed earlier) would not fit well the traditions of Hungarian industrial relations. The other issue with regard I find the provisions of the 1992 Labour Code better is the protection of works council members and I believe that the system of full protection should be restored.

As a conclusion, it would be required to review the provisions concerning works councils. Whereas revision of some regulations would require redesigning the industrial relations, revisiting sanctions and extending the protection to work council members would be easily achievable, yet immediately required to meet the conditions set forth by EU Directives and the European Social Charter. However it might occur as an overwhelmingly strong statement in a doctoral dissertation, the new Labour Code – in line with other legislative measures concerning social dialogue[540] –had a significant share in the process which has gradually turned collective labour law into vaudeville in Hungary.

As a normative conclusion, it would be required to review the provisions concerning works councils and information and consultation rights of employees in cases of collective redundancies and transfer of an undertaking. One is that adequate protection of employee representatives need to be ensured. Thus, protection against dismissal and temporary reassignment should cover all trade union officers and members of the works council. Two, is that dissuasive remedies have to be implemented in case of violation. It could be an administrative fine or nullity of the employer's action, with discretion power of labour courts over imposing the adequate one based on the nature of the infringement. Three, employees need to have sufficient information and consultation in cases of transfer of an undertaking and collective redundancies. Employer's obligation to consult and negotiate cannot be restricted to cases when works council is present at an establishment. The right to information and consultation is an individual right of every single employees at an establishment, of which they shall not be deprived in the absence of a works council. Tying the right to be consulted to the existence of works council is especially dubious with regard to the new rules of election of works councils. It shall not be the aim or consequence of any labour regulations to punish employees for not electing a standing body for their representation, but to encourage and facilitate employee involvement, yet to ensure that employees could exercise their right to information and consultation, and by that means, that they are effectively have access to information and are being consulted with regard to issues significantly affecting their worklife and employment. These modifications are also required to meet the conditions set forth by EU Directives and the European Social Charter.

[540] Most notably Act XCIII of 2011 on the National Economic and Social Council (*Nemzeti Gazdasági és Társadalmi Tanács*), which abolished tripartite social dialogue in Hungary, or, as a matter of fact, social dialogue *per se*. Another example could be the Permanent Consultation Forum (*Versenyszféra és a Kormány Állandó Konzultációs Fóruma*), which was not even established by a legal instrument. For a similar opinion see, J Radnay, '*Munkajogunk helyzetéről'* (2010) 9-10 Gazdaság és Jog, 33.

PART IV

NON-DEMOCRATIC MODELS OF PARTICIPATION

Introduction

It is widely accepted that the different models of employee involvement are influenced by the different traditions of industrial relations. Also, many studies prove that political democracy and workplace democracy are deeply interconnected.[541] However, it is much less researched how the social perception of democratic values influences employee involvement. My third hypothesis was:

H3 PARTICIPATION IS SUBJECT TO SIMULTANEOUS RECOGNITION OF INDIVIDUAL FREEDOM AND THE FORCE OF SOCIAL INFLUENCES ON THE EXTENT AND REACH OF INDIVIDUAL FREEDOM.

Recognition of individual freedom is only possible in democratic environment. The right to information and consultation is an individual right, in a sense that it should be enjoyed unconditionally by every employee, and which is exercised by the representative body of employees[542] and it is not possible to have genuine participation in regimes which deny the existence or even question the importance of individual freedom. Thus, the simultaneous recognition of individual freedom and to the force of social influences on the extent and reach of individual freedom are equally important.[543] The social embededdness of individual freedom as a democratic value is much dependent on cultural traditions.

Japan provides a suitable case of study of the connections between democracy and culture. It is a country with a stable constitutional democracy; politically the country has been constitutionally and electorally democratic since the end of the Second World War. However, democracy in Japan (like in all countries) is far from perfect, and ideal conceptions are in contrast to realities. The regulatory concept concerning political and social institutions is

---

[541] See for example, Diamond, M.A. and Allcorn, S. '*Surfacing perversions of democracy in the workplace: A contemporary psychoanalytic project*' (2006) Psychoanalysis, Culture & Society; Haque, M.S. '*Threats to workplace democracy'* (2000) 2 Peace Review, 12; Harrison, J.S. and Freeman, R.E. '*Democracy in and around organizations: Is organizational democracy worth the effort?*' (2004) Academy of Management Executive; Turner, L. '*Participation, democracy and efficiency in the US workplace'* (1997) 4 Industrial Relations Journal, 28, 309-313.

[542] E Ales 'Information and Consultation within the undertaking' *in Recasting Worker Involvement? Recent trends in information, consultation and co-determination or worker representatives in a Europeanized Arena*' (Kluwer, 2009) 13. Similarly, Otto Kahn-Freund argued that the right to strike is an individual right; see, O Kahn-Freund '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe), 5 ff.

[543] A Sen, 'Development as Freedom (1998), xii. 283-89.

similar to that of the Western models, however, it emerges form a fundamentally different cultural tradition.

Under the Meiji Constitution[544]democracy was not a principal value of the political system, and the Constitution was to facilitate national cohesion and centralized authority.[545] Japan desperately needed to industrialize and modernize quickly to protect its sovereignty from imperial Western powers; thus, a political institutional system serving a cohesive government with minimal opposition was seen as the best means to achieve this goal. After Japan's surrender, the American occupying forces aimed to transform Japan to a peaceful democracy by establishing fundamentally different political, social and economic conditions. One of the most important changes was a new constitution, replacing imperial fiat by popular sovereignty. On one hand, as a result, Japan's contemporary constitution provides one of the world's most extensive catalogues of citizens' rights.[546] On the other hand, daily practices reveal many specific examples in which realities fall short of the constitutional ideal. Three major aspects are usually mentioned in this context: social discrimination, gender equality and the intrusion of the State.[547]At the same time, Japanese education system promotes conformity over individuality. [548] Despite the constitutional guarantees, the Japanese parliament is contested to be the highest organ of state power, and claimed to be instead the highest ratifier of decisions made elsewhere, like business, bureaucracy and political parties.[549]

My research interest here was what are the connection points of a circumvented political democracy and that of a decision making processes at workplaces. My assumption here was that without democratic culture on a micro-environment, such as a workplace, democracy cannot flourish on a higher level either; therefore, the system that governs employee involvement does influence political democracy. The research question I examined under this chapter is *How traditional decision-making patterns at workplaces influence employee involvement in Japan?* (Q7).

The state-socialist model of participation in Hungary constitutes an interesting research area for many reasons. First, I aim to demonstrate that participation is a genuine and natural need of employees. Participation movements were not linked to property rights, it arose as an ordinary need to boost productivity and control business activity to increase firms' income for mutual benefit of owners and workers. Second, the Hungarian Communist Party noticed the potential power of shop committees very early and used all possible tools to get them under their influence. This effort proves that employees are able to demonstrate significant weight in both economics and politics through participation. However, the early

---

[544] The Meiji Constitution prevailed in Japan from 1889 unitl 1947.

[545] T J Pempel, '*Japanese Democracy and Political Culture: A Comparative Perspective'* (1992) 25 Political Science and Politics, 5.

[546] Among the most prominent ones: right to equality and the absence of discrimination (Art. 14), public officers are elected through secret ballot based no universal suffrage (Art. 15), The right to petition for political changes (Art. 16), the right to freedom of conscience (Art. 19), religious freedom (Art. 20), right to free speeches, press and expression (Art 21), freedom of residence and occupation (Art. 22), academic freedom (Art. 23), the right to a minimum standard of a wholesome and cultured living (Art. 25), the right to an equal education (Art. 26.), the right to workers to organize and to bargain collectively (Art. 28), the right to access to courts (Art. 35).

[547] See, for example, E Krauss and T Ishida, Japanese Democracy, (Pittsburgh, 1989, University of Pittsburgh Press), G McCormack and Y Sugimoto, Democracy in Contemporary Japan (Armonk, 1986, Sharpe).

[548] K Ferber, A siker ára, 2nd Edition (Budapest, 2014, Syllabux).

[549] T J Pempel, '*Japanese Democracy and Political Culture: A Comparative Perspective'* (1992) 25 Political Science and Politics, 11.

years of employee participation after the Second World War has been rather under-researched. Here my aim is to fill this gap in the history of employee participation in Hungary.

Third, employee participation and political participation, as argued above, are interconnected in many ways. Genuine involvement in the conduct of business protects the human dignity of workers, as through participation decisions are not made above their heads. Employees in such way could experience the efficacy of democratic decision making. However, when participation is used merely as a window-dressing and employees are ripped off their involvement rights, anger and sense of betrayal are soon followed by political passivity. When one is disappointed in her power to form her micro-environment, such as a workplace, it is hard to believe that efforts would be paid out on a larger scale. Likewise, when democratic values are not respected in the political field, grass root movements fostering democratic decision making would also likely to be suppress sed. Hungary's case explains this well: participation movements had great importance in politically tense historical moments, such as the recovery period after the Second World War and the 1956 revolution. It was widely believed that democratic control over workplaces and democratic political regime are interconnected. However, after democratic movements were turned down, citizens by and large became politically passive and parallel to this, as employees they also lost interest in participation at workplaces. The historical perspective helped me to observe these phenomena in unbiased. Also, the rich materials of the Trade Union Archives and the Institute of Political History offered an enticing research challenge.

What interested me in this context was in connection with the state-socialist model was *whether participation could function in a genuine manner in an autocratic regime?* (Q8)

Chapter 1
The Japanese Model of Participation

The rapid economic growth in Japan, also known as the 'Japanese economic miracle' has gained much attention all over the world. Indeed, the Japanese GDP got doubled and then tripled in the 1960s compare to the years following the Second World War.[550] The 'life-long employment' model widely used in Japan significantly contributed to this success. I examined whether socio-cultural reasons, especially the surviving feudal patterns in decision making processes could influence employee involvement model of contemporary Japan. I found this issue particularly interesting. The Japanese value system of '*wa'* promotes a non-conflictual dispute resolution and cherishes the harmony of interests in decision making. However, as it was pointed out by Otto Kahn-Freund, it is a fake belief that industrial relations could ever become harmonious due to the inherent differences of interest between labour and management and conflict is not only natural but also necessary to resolve these contradictions. It could be assumed that the outstandingly peaceful industrial relations in Japan after the 1970s are due to the '*wa'* spirit on workplace level.

Japan has gone through rapid economic and political transformation after the war, but such change was not accompanied by the evolvement of democratic values in the society.[551] However the legislative environment has changed noticeably in favour of employee participation over the years, deficiency in workers' influencing ability is still remarkable. The 'life-long employment' system, a flagship institution of Japanese labour market, completely lacks democratic decision making processes and its underlying philosophy has attempted employee participation to gain acceptance in the corporate culture. On the other hand, possibly due to the weak perception of democracy in a society as whole, employees working outside of the life-long employment system have not been able to implement participation rights at their workplaces either, despite the fact that the legal environment has persuaded labour and management to include such institution more fully to their decision making processes.

However, the 'democratic ethos' surrounding the *wa* principle has faded in my eyes. Both my desk researches and personal experiences with traditional Japanese enterprises made me think that the long praised decision making process at workplaces are neither democratic nor harmonious. I believe that employees' behavior at workplaces is chiefly motivated by fear. A fear of being stigmatized by representing personal preferences over communal ones, the fear of discharged from the group for going against its alleged interest or ultimately of

---

[550] G Bai 'Japan's Economic Dilemma: The Institutional Origins of Prosperity and Stagnation' (New York & Cambridge, 2001, Cambridge University Press).

[551] See for example, M Schalber, *'The American Occupation of Japan: The Origins of the Cold War in Asia*' (OUP, 1985); M E. Caprio and Y Sugita, *'Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society*' (Taylor and Francis, 2007); CJ Coyne, *'After War: The Political Economy of Exporting Democracy*' (Stanford University Press, 2008).

losing a stable job. In the patriotic workplace environment the assumed answer is always given together with the question and it is hard not to agree with it. Conflicts do exist under the surface but it is not advised to take them up. However, before getting to the analysis concerning participation, it is necessary to provide a brief introduction to the Japanese employment system in general.

I Introduction to the Japanese Employment System

Customarily Japanese employment system could be characterized by four major, deeply interconnected elements: life-long employment system, enterprise-based trade unions, cooperation-oriented industrial relations, cultural traditions. While these elements are interrelated, due to the subject matter of the current thesis, special attention is given to the nature of the industrial relations. In that sense, the nature of the industrial conglomerates (*kaisha*), still dominant on the labour market,[552] has utmost importance.

The most important 'battlefield' for collective bargaining is the enterprise, and trade unions generally represent so called 'regular' employees, working with the frame of the life-long employment system. Despite of the numerous incidents, Japanese industrial relations have been rather peaceful in the last decades.[553] Among other factors, here three have to be mentioned: one is the influence of the Japanese Productivity Centre on economy and industrial relations. Established in 1955, the aim of the Centre has been to improve the output of Japanese economy and to enhance the market position of Japanese companies on a global scale. The support of such movement within the Japanese society, including that of the trade unions, has been great.[554] Cooperation between management and labour is one of the key elements of the policy pursued by the Productivity Centre, as industrial peace largely contributes to greater productivity. Two is the role of *Shunto*, the spring wage offensive. Most of the wage negotiations are taking place every year in April and May in Japan. Started in 1955, its aim is to coordinate enterprise-level wage negotiations across firms and industries. First, the national labour organizations and industry-wide trade union federations set the goal for wage increases[555] and the negotiation times for each industry based on the conditions of the national economy. Then the leading enterprise union negotiate the wages within the frame

[552] However, the number of people working for large conglomerates has been gradually shrinking; it is about 20% of the total workforce. Paralel to this phenomenon, the proportion of regular employees has been also getting lower, in 2010 around 60% of the total workforce enjoyed the benefits of traditional employment. See, the JILPT's annual research at http://www.jil.go.jp/english/lsj/general/2013-2014/2-5.pdf (last retrieved on November 13, 2014) 44 ff.

[553] For a detailed explanation on the pluralist trade union system and the types of conflicts see, J Hajdú, 'A japán munkaügyi kapcsolatok sajátosságai a kezdetektől 1995-ig' (Szeged, 2006, Pólay Elemér Alapítvány) 18 and 98 ff.

[554] See, J Hajdú, op cit, 18.

[555] It has to be noted that in the past five years there was an agreement between the representatives of employers, trade unions and the government, that no wage increament could be implemented due to the fragile status of the Japesen economy. For a detailed analysis see, http://www.jil.go.jp/english//lsj/general/2013-2014/4-3.pdf (last retrieved on November 13, 2014), 116 ff.

set by the national organizations, after which the remaining unions do their negotiations, following the pattern. Since the recommended wage increment is set on a higher level, the enterprise-based unions do not need to take up a fight with the employers on salaries. This pattern has been largely contributed to industrial peace in the past decades. Three is the cultural tradition of 'wa', the golden rule of harmony, implying a peaceful unity and conformity within a social group, in which members prefer the continuation of a harmonious community over their personal interests.[556]

The characteristics of the Japanese society, homogeneity, non-confrontation dispute resolution, collective decision-making patterns and social unity in recognizing the importance of economic growth of the nation also have utmost importance in forming industrial relations.[557]

Major legal instruments governing employment relations are Article 27 and 28 of the Constitution, declaring the right to work, labour union rights and the policy of formulating work standards, the right of workers to organize and to act collectively. Together with Article 13 on the right of personal autonomy, Article 25 on the right of livelihood, Articles 22 and 29 on liberty of contract and guarantee of property, they effectuate basic rights in the field of labour relations. The primary legal standards governing individual labour relations include the 1947 "Labour Standards Law," the 1985 "Law Respecting the Improvement of the Welfare of Women Workers, Including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment," the 1976 "Security of Wage Payment Law," the 1972 "Industrial Safety and Health Law," and the 1947 "Workers' Accident Compensation Insurance Law." The most important piece of legislation concerning collective labour law is the 1949 Act on Trade Unions.

II Development of Industrial Relations

The political and economic democratization principally driven by the Occupation forces after World Word II was not accompanied by the democratization of the society and the lack of societal changes prevented the development of industrial democracy.[558]

Essays on Meiji restoration often point out how smooth the transition was to capitalism: the end of shogunate is intertwined with economic changes; the industrial growth and modernization brought massive development to infrastructure and production accompanied by waves of migration from the countryside to the urban centres; the openings of the ports and the reforms in the monetary system explained the emerging importance of

[556] C Genzberger, 'Japan Business: The Portable Encyclopedia for Doing Business With Japan' (1994, World Trade Press) 155.
[557] See, J Hajdú, op cit. 81.
[558] M E Caprio and Y Sugita, 'Democracy in Occupied Japan: The US Occupation and Japanese Politics and Society' (2007, Taylor and Francis).

urban merchants.[559]However, regarding the internal relations of the production units, much less development and modernization could be traced. The feudal relations were deep-rooted in the society and tied production methods to the commodity production patterns with its master-servant relations, and, together with the restriction on labour movements, deprived the labourers to establish their own rights and protection system to counterbalance capital's power. The power of the head of household included over its labourer made the enjoyment of any such right dependent of the goodwill of social superiors[560].

After the death of Emperor Meiji, without the existence of 'citizenry', the traditional patriarchal characteristic of the society was rapidly re-established[561] and supplemented the ideology surrounding the *tennosei:* the imperial system based on the divine power[562] of the emperor, characterised by loyalty and filial piety.[563] Not so surprisingly, the few labour regulations existed were almost all about prohibition;[564] most remarkably, the freedom of association was banned and sanctioned by criminal measures.

To counteract the negative impact of the high turnover, the large-scale businesses had started to develop personnel policies, at first the seniority based wage system, on which basis the 'Japanese Employment System' eventually emerged.[565] Although not yet overly sophisticated, this system offered considerable alternative to the patriarchal relationship, which was based on devotion and gratitude towards the owner of the business.

Factory workers could not hope for much support from trade unions. Even before the ban on trade unionism, organized labour's approach was quite different from the European pattern. A petition drawn-up by the Japan Railway Company illustrates well the disparity: *"[we] humble workers, do sincerely feel that deep gratitude for the many life-sustaining benefits the company has bestowed upon its workers must be expressed. However, pressed by circumstances ... [we] humbly point out that it would be most fortunate if the Company would, on the basis of its consideration of the situation, judge the above points."*[566] The major achievements of the union were the Factory Law in 1919 and its revision in 1923, and the Labour Disputes Conciliation Law in 1926, was a de facto recognition of unions was replacing the previous system whereas police had been the agent for conciliation.[567] However, strikes were soon prohibited; union activity was first restricted in 1936 than replaced by the 'industrial patriotic units' in 1939, one of the indications of the dark valley of the 1940s.[568]

Overall, after the total defeat of Japan in World War II, reforms initiated by the Occupation were thrown onto a relatively immature system of industrial relations. The major pieces of labour legislation were not products of a gradual, bottom-up developments and

---

[559] For example J Hirscheime and T Yui, '*The Development of Japanese Business* (Allen and Unwin, London, 1981).
[560] Woodiwiss (1992:28)
[561] Ibid.
[562] The Meiji Constitution defined the Emperor (Tenno) as "sacred and inviolable" with its first chapter stressing the Tenno as the symbol of an unbroken imperial lineage dating back to the world's creation
[563] More on constitutional loyalty: Yukio 1918:46-47
[564] A partial exception form general prohibition was a small number of skilled workers in some of the large enterprises in shipyards and ironworks, who were relatively free to resign and they had the possibility to bargain – individually - over their wages. (Woodiwiss 1992:37)
[565] Woodiwiss (1992:51)
[566] SE Marsland, The *birth of Japanese Labour Movement*, University of Hawaii Press, 1989, p. 94.
[567] D Baker '*The Trade Union Movement in Japan'* (1965-66) 23 International Socialism, 19-26.
[568] Association for Serving the Nation – *Sangyo Hokokukai or Sampō*

therefore their impacts on the unprepared workers and capital was unique too. The Occupation's labour policy, alongside the economic reconstruction, was a part of the defeudalisation process.[569] It included the total demilitarisation and the transformation of the social and economic forces that had had a major role in the "imperialist adventure" of Japan.[570] Reforms encouraging the development of peaceful and democratic forces were implemented, yet industrial recovery was secondary on the SCAP's agenda until 1948.[571]

A "Schoolhouses of Democracy" - The Trade Union Law

Changing the industrial relations was on the top priorities for SCAP in 1945.[572] General MacArthur believed that trade unions are "schoolhouses of democracy", and re-establishing them would help preventing future aggression and supply workers with democratic ideals, as well as serve as a general index of political liberalisation.[573] Obstacles were cleared away soon. The reactionary patriotic units were abolished and former political prisoners, among whom there were many prominent labour activists, were released in October 1945. The Labour Union Law was said to be modelled after the American Wagner Act.[574] However, the right to organise, bargain collectively and strike had already been existed due to the Factory Law, and dispute conciliation had also been established by the Labour Disputes Conciliation Law.[575] On the other hand, as it was discussed above, these rights were neither deeply rooted in the society, not well protected by the state.

The newly enacted law had a revolutionary impact on the long-repressed labour movements. In a couple of months, unionisation rate surpassed the pre-war peak and the upsurge had been continued until 1949, when the unionisation rate was more than 50 per cent.[576] After the surrender, the corporate leaders, still under the shock of total defeat, had not developed a coherent economic vision. Trade Unions, on the other hand, via shop-floor activities, managed to create their own voice in how to run the company, brought up plans for industrial recovery, and pressed for higher wages.[577] Trade Unions had major impact on reordering the economy, and through their members they had decision making power in the everyday work, effectively realising economic democracy.[578].

---

[569] Takemae 2003:307
[570] Ibid.
[571] In 1948 the pressure of the Cold War made it unquestionable that the United States interests were best supported if Japan had become a powerful player of the world market.
[572] Supreme Command of Allied Powers
[573] Takemae 2003: 311
[574] National Labour Relations Act
[575] Yet not on a prefectural level, which was established by the 1945 Trade Union Law
[576] The number of the union members was around 7 million workers. Schonberger 1989:115
[577] Takemae 2003:314
[578] Members of the Labour Division rapidly recognized that the enormous success of unions was in fact the result of the desperate conditions workers faced. The inflation rate after the surrender was 987 per cent, which had dramatic effect on real income. Food shortage led to massive street demonstrations. Brutal working conditions, especially in mines, where majority of the workers were non-Japanese escalated and workers actions were

General MacArthur, who had impressively claimed that history of labour movement had not seen such a rapid development in such a short time-frame, on 20 May, warned Japanese people that such mass movements, often resulted in violence were against both orderly governance and the purpose and security of the Occupation. SCAP promptly drafted a harsh public security ordinance, sentencing those who are engaging in 'act prejudicial to Occupational objectives' to prohibitive fines and prison terms of up to 10 years at hard labour.[579] The 'schoolhouses of democracy' seemed to be shut down. The formal prohibition of the strike was a turning point in the Occupation.[580] It was a denial of workers basic right, which had just been declared by the Occupation two years before. The reasoning, that the Japanese economy and society was not mature enough to deal with the general work-stoppage recalls the patriarchal rhetoric of the *tennosei*.

B Labour Laws in the Post-war Era

The same patriarchal tone is detected by Woodiwiss in the way how the New Constitution of Japan[581] declares the rights and duties of workers.[582] Articles 25-28 deal with the right to work, stating that "[in] all spheres of life, the State shall use its best endeavours for the promotion and extension of social welfare and security, and of public health." Woodiwiss claims that in such legal environment, other labour laws, namely the Labour Relations Adjustment Law of 1946 and the Labour Standard Law of 1947 had no choice but follow the pre-war state partiarchalism.[583]

The Labour Relations Adjustment Law (LRAL) starts off with a rather imperative language[584] stating that in the name of industrial peace and economic development, labour shall only exercise the rights outlined in the Trade Union Law as an ultimate solution. Therefore, as Woodiwiss points it out, the employment relation in Japan remained very much a status relation rather than a contractual one.[585]

Labour reforms carried out by SCAP were influenced by the ideology of New Deal.[586] They supposed to be built on the already existing patterns of union representation, leaving very little space for other means of workers' involvement. The Labour Standards Law (LSL), effective of September 1, 1947 was a set of minimum standards, providing for a broad and

---

suppressed by the Japanese police. Japanese government officials and business leaders were much afraid that under such conditions Communists would take over labour movements, and they were determined to support American policy makers to stop the radicals.

[579] Imperial Ordinance No 311, issued on 12 June, 1946.

[580] Takemae 2003:320-321

[581] Also drafted by SCAP

[582] Woodiwiss 1989: 102

[583] More on the legislation: Toyoda 2007:68

[584] Woodiwiss 1989:110

[585] Woodiwiss 1989:111

[586] Takemae 2003:324

detailed protection of workers,[587] which could be explained by the fact that no such regulation had existed in the pre-war era.[588] In 1947 the Labour Division also adopted other measures in order to modernize employment practices. It contained the Unemployment Insurance Law, and the amendment of the Workman's Compensation Insurance Law to complement the compensation of the victims of the industrial accidents and diseases with regulations related to a mandatory health insurance programme.

Though the Labour Standard Law together with the other elements of the labour legislation has been modified throughout the years, it has never been made an explicit move in favour of the life-time employment system. Based on the text of the laws the emergence and popularity of the system could not be explained or even be understood.

III Specific Issues of the Japanese Employment System

The Japanese employment system (or 'life-time employment system') is usually characterized by the seniority based promotion and wage systems and the enterprise-based trade unions. The methods by which the promotion and wages are determined have been heavily discussed in numerous scholarly papers,[589] however, the sociological background of group dynamics are not commonly examined in these analyses. The key to understand the nature of employee participation lies in the fundamental mechanisms of groups therefore analysis from the perspective of sociology is vital.

A Corporate Groups

According to Nakane's comprehensive analysis on Japanese society,[590] it shall be assumed that workplaces have dedicated role in the employees as well as their families' life. Nakane argues that the kinship which is normally seen as a basic unit of human attachment is replaced

[587] Covering the labour contract, notice period, wages, holidays, health and safety regulations, protection of female and juvenile workers, training, accident compensation, a disciplinary code and dormitory regulations

[588] The Labour Standard Law was not originally planned by SCAP. It was eventually resulted from the joint efforts of Teramtoto Kosaku, a social bureaucrat of the Welfare Ministry and Golda G. Stander, the head of Division's Wages and Working Conditions Branch of the Labour Division. Rumour had about it that the act was later called "the baby of Teramoto and Stander."

[589] For an insightful overview see, T Araki, Labour and Employment Law in Japan (Tokyo, 2002, JILPT), 17 ff; and T Hanami, Labour Relations in Japan Today (Tokyo, 1976, Kodansha International) 19 ff.

[590] Nakane 1972

in Japan by a personalised relation to a corporate group based on work.[591] In the post-war society the company is conceived as a household institution (*ie*) and all the employees are qualifying as members of the 'household', having the employer as its head. As one becomes a member of the family by birth, an employee becomes a member of the company by employment, and such event – considered as a second birth – is surrounded by a spectacular ceremony.[592]

The family embraces its members as a whole; likewise the company engages the employees' whole personality not only the capacity during working hours, and readily takes responsibility not only for the employees but for their families as well.[593] This is called *marugakae*, which could be translated to English as 'under patronage'. The company has a fairly patriotic approach towards the employees, providing workplace security and more or less steady employment conditions. As a return, the employer requires unconditional loyalty to the group (eg, the employer) and sacrifice of the employee's ties to other groups, including emotional participation[594] – as the Japanese proverb reflects this phenomena quite adequately: no one can serve two masters. The Japanese concept of such 'one-ness' refers to the ultimate integrating power of the group which restricts the behaviour of its members, including that of the leader himself.[595]

However it is crucial to make a careful decision who is eligible to become a member of the group. Practical knowledge or theoretical understanding are secondary for hiring, moreover, cognitive skills too are seldom measured.[596] Applicants – usually university or college students in their final year – taking the company's test are ranked by their cooperative spirit, sense of balance and executive ability – skills indispensable for survival.

B *Derukuiwa Utareru* – The Nail That Sticks Out Shall Be Hammered Down

The vertical relations among the group members have principal significance in creating group cohesion, resulting in a delicate and complex system of ranking. One's place in the hierarchy could be based on various factors:[597] age, time of entry into the organisation, length of service and the like. The vertical relations define the individual's place within the group. One can clearly find his position at the workplace by knowing who is senior (*sempai*), junior (*kohai*) or

[591] Nakane 1972:4
[592] Freshmen participate in a ceremony when they officially become a member of the company, usually gathering in the main hall of the company to listen to leaders' speeches which is often followed by the company's anthem. After the ceremony a general introduction to the company's values takes place, such principles should be memorized and followed with respect.
[593] For example established companies provide company housing, hospital benefits, family recreation opportunities and monetary gifts for family events such as marriage, birth or death.
[594] Nakane 1972:8
[595] Nakane 1972:14
[596] It is also in line with the Japanese on-the job training system.
[597] This can be detected not only in the companies' structure, but also in the field of academia or art.

equal (*douki*) to him – categories which would be blended to simple term of colleague in the Western word. Once the rank is established, it is applied to all circumstances regarding social life and individual activity.[598] Originated in the specificity of Japanese language, not knowing the internal relations of the group makes it impossible even to speak to fellow workers.

Albeit stable, a system based on unchangeable social manners is rigid. Institutional position and title defines the employee's position in the company[599] and individual traits or achievements are overlooked. It links to one of the characteristics of the Japanese employment system, which is addressed as the 'seniority based promotion and wage systems'. With other words, wages are not related to either individual or to the company's performance (like sales, profit or market share growth) but correlate with the employee's position in the company, while promotion is directly linked to the years of continued service.[600]

Extreme consciousness on hierarchy affects intra-group communications. A rank-and-file employee is not supposed to talk directly to a manager or a director, skipping the immediate supervisor. Junior members carefully avoid any open confrontations with their superiors. The avoidance of the expression of one's negative opinion rooted in the fear that it may disrupt the harmony of the group, which could easily jeopardize one's position within the group.[601] Therefore the expression of opinion in a group is pretty much determined by the group member's position which negatively influences the limits of freedom of speech. Opposing the majority could lead to isolation within the group[602] and could be subjected to various disciplinary measures.

The disciplinary measures implemented for breaching the rules depend on the grade of violation of the group harmony. For example, in a milder case, the regular employee is assigned to branch which is far away from the headquarter, more severe breach of the rules might be resulted in being transferred to a subsidiary of the parent company – in most cases with considerably inferior working conditions. The next step is when the employee is dismissed, or in the worst case is subject of disciplinary discharge.[603]

As a part of *marugakae,* violations of the rules and duties of the employee status contains a special cohort: misconduct in one's private life. The Supreme Court has widespread precedents related to disciplinary punishment in that area. Though, disciplinary discharge is only valid if it is proven that the employees words and deeds in the private life

---

[598] Nakane 1972: 26-28.

[599] Therefore in the society too: a superior in one place remains superior in every social interactions, in restaurants, at home, in the street; even when the wives of the employees meet, they are adjusting their manners to the rank of the husbands at the company,

[600] On the other hand, certainly there are not as many managerial positions at a company as many employees. Therefore the companies operate with a rather complex internal structure with several layers filled with great many deputy-managers and the like. Most of these positions do not bear real authority and decision making power. Though it is commonly known that these employees titles do not in reality reflects to their importance in the company, the still growing salaries are somewhat compensating the slight social disgrace.

[601] Nakane 1972:35.

[602] The sometimes extreme manifestation of "bullying" among students in elementary or secondary school (or even at the university) is another example for isolation. A further historical proof goes back to the samurai era, when households breaching the rules of the village community were deprived from the community's help which was a question of life and death. The Japanese proverb 'one can live without cousins but not without neighbours' reflects the importance of the acceptance (and supremacy) of the group.

[603] Disciplinary discharge is the capital measurement of disciplinary measures. It is normally carried out without notice and without payment of the allowance in lieu of a notice, and all or part of the retirement allowance is not paid. For further details see: Sugeno 2002:423

are directly related to the enterprise's activities, or cause a loss in the society's estimation of the enterprise.[604] Disciplinary punishment could be exercised for violation of the duty of loyalty too. An employee would violate his duty for example by participating in a boycott of the employer's manufactures, or distributing handbills attacking the company.[605]

Due to the above described specificities together with highly company specific professional knowledge resulted from the on-the-job training system makes re-employment hardly possible, coupled with the psychological and emotional burden of being a newcomer in a group.

Following Nakane's theory on the fundamental structure of the vertical organization, after a newcomer enters a group, due to the rigid hierarchy already established, the new member cannot change his relative position within the organization, and the individual's group participation is regulated by his relation to the other group members.[606] In *marugakae*, spending time with co-workers after business hours or during the weekend in pubs or on sports events are important to build up a social capital, which capital is manifested in higher salary and position.[607] The later stage and to the lower position one enters, the lesser chances that he will ever become an established member of the new group.

C Leadership and Decision Making Processes

The difficulties of channelling one's opinion upwards in the hierarchy would lead to organization inefficiency if it was not counterbalanced by the excessive power of top-down communication.[608] The authority of the seniors is unquestionable and juniors ought to carry out orders without the slightest sign of hesitation. Refusal or even questioning is a trace of disloyalty and considered as a violation of the group integrity.[609] Therefore, the mobilizing power of the leaders is quite outstanding.[610]

---

[604] For example in the *Koketsu Chugoku Shisha* case (Supr. Ct. 1st Petty Bench, Feb 28, 1974, 28 Civ. Cases 66) the employee was lawfully subjected to disciplinary discharge for getting drunk during the night and forcing himself into somebody's private residence, as it caused an "exceptional harm to the company's social reputation". In the *Nihon Kokan* case (Supr. Ct. 2nd Petty Bench, Mar. 15, 1974, 28 Civil Cases 265) the discharge of the employee who was arrested and prosecuted for participating in a demonstration opposing the expansion of the American Army base was judged void, as the employee was "only one of 30,000 employees", and his sole action did not cause exceptional dishonour to the company.

[605] *Kansai Denryoku,* Supr. Ct. 1st Petty Bench, Sept. 16, 1983, 1094 Judgments 121 – the distribution of the handbills in company housing violated enterprise order, because of the danger that it *would* provoke employee disloyalty (emphasis added). Sugeno 2002: 435 Note 39.

[606] Nakane 1972:41

[607] Marosi 1985:61

[608] Nakane 1972:52

[609] On decision making processes in academia see Ferber 2012:152-153

[610] Japanese employment contract hardly define the scope or location of the job. The reasons why an employee is not hired for a specific job but as a member of the company are various yet linked to the mobilization power of the management allowing them to transfer the employees to job content or work location spanning for substantial period of time to meet business needs without modification of the contract. It is also linked to the generalist-oriented management policies related to the on-the-job trainings.

Any popularity or recognition awarded to the individual shall be enjoyed by the group and not the individual and no individual popularity shall exceed that of the senior or boss, otherwise the harmony of group is breached.[611] Individual freedom of action is also limited by the radius of the group, actions shall always be for the group and decision making is allowed only in direction provided for by the group. Someone who contributes little can remain comfortably within the group as long as he remains loyal to it.[612] Thus a capable member might encounter difficulties when he wants to remain the part of the group. Leadership could be attained by either waiting for one's turn in the seniority ladder or by leaving the group and forming a new one.[613]

On the other hand, the leader of the group is far from autocratic. In fact, the better and stronger the leader, the more strongly he is able to tie the subordinates emotionally. In this paternalistic relation protection is repaid with dependence, affection with loyalty.[614]Another characteristic of the system is that the weaknesses of the leader are counterbalanced by the strengths of his subordinates. Since promotion in the life-time employment system is based on length of service and not on individual merits, it is not essential for the superior to be outstanding in terms of skills. Thus the leader is never independent or separable from the group, but a part of the organization up to the point that he has almost no personal identity and surrenders himself for the interest of the group.[615]

This mutual dependence is manifested in the consensus-looking decision making system of *ringi-sei.* In *ringi-sei* the decision making right is not dedicated to a specific member of the group, but all input is seemingly considered before the final conclusion. Thus the leader does not directly force his will on juniors but let them present their ideas freely for discussion. In case of disagreement, the leader mediates between the opposing factions to find group consensus. Given the strong ties of senior and junior members of the group, the majority opinion quickly emerges without logical examination of the given problem. Group cohesion is strong, therefore no individual liability (not even that of the leader) is presumed in case of mistakes.

Though it is often labelled as democratic decision making process, due to the interdependence of the group members and their leader, balance and stability within the group can only be maintained on the expense of the minority.[616] The *marugakae* does not allow individuals to take their own actions or decision, as in every moment they are controlled by the group. Joint decision making blurs the boundaries of leadership and – at least on the surface – enhances group cohesion. Yet the lack of clear responsibilities and liability indirectly increases the individual's dependence on the group.

---

[611] Japanese put a lot of emphasis on group harmony or *wa,* the harmonious integration of group members which has multiple layers.
[612] Nakane 1972;83
[613] Nakane 1972:49
[614] Nakane 1972: 64
[615] Nakane 1972:57, 69. In fact there is no Japanese expression for leadership, it is explained by the senior-junior (*oyabun-kobun*) relationship.
[616] Nakane 1972:53

IV Employee Participation

Industrial relations in Japan are quite decentralized; most of the bargaining is taking place on enterprise-level. The trade Union Law defines what a collective agreement is by stipulating that a "collective agreement between a trade union and an employer or an employers' organisation concerning conditions of work and other matters which is put in writing and is either signed by or with names affixed with seals by both of the parties concerned".[617] Even though the collective agreement usually is an outcome of collective bargaining, the law does not require the collective agreement to be a result of a collective bargaining. Thus, collective agreement concluded in other types of negotiations like joint labour management consultation, mediation, settlement and the like could, to the extent possible be recognized as satisfying the above definition.[618] Likewise, there is no sharp demarcation line between the institutions of collective bargaining and joint labour-management consultations, the two major forums where negotiations take place.

The functions of an enterprise-based collective agreement, which is the predominant form in Japan, are threefold. One is to establish and to secure standards of treatment of workers in the employment relationship for a prescribed period of time, two is to establish the rules concerning the relations between unions and employers, and three is to systematize various types of union participation in certain management decisions.

Another important aspect to be mentioned is the legal regulation of work rules. Work rules – practically drawn up by employers regularly employing ten or more employees[619] – have a powerful function to the working life of employees at a workplace. Various conditions, such a wages or working hours could be uniformly established by an employer, thus the lawmaker introduced a guarantee system which aims to protect workers against the unilateral will of an employer. These are that the works rules have to be made known to employees, there are statutory limits regarding the content of the work rules, most notably the supremacy of collective agreements over work rules, also there is administrative supervision to ensure that those limits are observed, and that work rules need to reflect workers' opinion, requiring those opinions to be requested in the course of formulating such rules.[620]

However, these guarantees are rather week, especially with regard to the procedure which supposed to ensure employee involvement in the drawing up of the work rules. In drawing up and changing the work rules, the employer is required to ask the opinion of a trade union organized by a majority of the workers at the workplace concerned, where such trade union exists, or of a person representing a majority of the workers, where such trade union does not exist (so called majority representative).[621] It is compulsory to submit the work rules to the labour administration authority, and an indispensable item of the submission process is

---

[617] Section 14 of Act of 1 June, 1949 The Trade Union Law (労働組合法 (*rodo-kumiaho*)).
[618] K Sugeno, *Japanese Employement and Labor Law* (Tokyo, 2002, Univeristy of Tokyo Press and Univerity of California Press) 578.
[619] Section 89 Para 1 of the Labour Standards Law
[620] K Sugeno, supra, 110.
[621] Section 90 Para 1 of the Labour Standards Law.

the document setting forth the opinion of the trade union or the employees' representative. Though the employees' opinion is channeled in and made express even at the administrative authority, this right only obligates the employer to request the employees' opinion, while the employer does not need to discuss the content of the work rule with the employees' representative nor the employer is bound to their opinion by all means.[622]

The Labour Standard Law (LSL)[623] allows employers to regulate issues related to basic elements of working conditions to the detriment of employees once a labour-management workplace agreement is concluded. The labour-management agreement is a written agreement between an employer and a trade union organizing a majority of workers in a workplace, or, in the absence of such union, the majority representative. Under LSL labour-management agreement could produce special effects on the field of workers' savings, deduction made form wages, working-hours averaging system, flex-time system, leaves, overtime and holiday work, special work time calculation system when the work is performed outside of the regular workplace, discretionary work system, payment during leave. The clear distinction between collective agreement and labour-management agreement is that the latter one does not have a normative effect, but it is limited to the legal effect of exempting from standard regulations established by the LSL. This is especially important as the subject matter of collective bargaining is rather wide in Japan; any matter dealing with the enterprise that an employer has the discretion could be a subject of bargaining.[624] Section 16 of the Trade Union Law provides for that the normative effect of a collective agreement conferred to the standards concerning conditions of work and other matters relating to the treatment of workers. Collective agreements continue to have a contractual effect even after their normative effect has been achieved by legislation.[625] Any parts of an individual employment contract contravening to the stipulations of a collective agreement are void and those parts are governed by the collective agreement's standards.[626][627]

It ought to be also noted that there is no such system as works council, through which employees or their representatives could be involved in decision making processes.[628] The only possible way for employee involvement is through the joint labour-management consultation. The Japanese system completely lacks the "German-type" of participation forms, the right to information and consultation is not recognized as such. The possibility to influence the employer's decisions is vested in enterprise-based trade unions and it is not provided for by statutory regulations, but merely an informal mechanisms.[629]

---

[622] The concerns regarding the institution of majority representative will be discussed later on.
[623] Also, labour-management agreement could be concluded under the Employment Insurance and the Nursing-Care Leave Act, for details see the part on Majority Representative.
[624] K Sugeno (2002) 563.
[625] T Hanami and K Fumito, *Labour Law in Japan* (2011, Kluwer Law) 35-37.
[626] Section 16 of the Trade Union Law.
[627] Persons covered by a collective agreement's normative effect are only the members of the trade union that is party to the collective agreement. (Except Sections 17 and 18 of the Trade Union Act).
[628] J Hajdú, op cit. 158.
[629] However, some initiatives were taken both by employers' associations and trade union federations. Ibid.

A Joint Labour –Management Consultations

As mentioned earlier, there is no well-defined difference between collective bargaining and joint labour-management consultation (*rodo kyogo kai*), the latter one could be considered as a special form of enterprise-based negotiations between employers and trade unions, or put it differently, a vehicle for sharing information and promoting mutual understanding between the parties.[630]

Typical examples, according to Kazuo Sugeno for subject matters for joint labour-management consultation are: pre-collective bargaining to gauge each other's intentions; negotiation that substitute collective bargaining and aimed at resolving issues, procedures involving participation in the operation of the enterprise that are designed to discuss matters of management and production that are distinct form the subject of collective bargaining; pre-event consultation before personnel matters, although these are subject to collective bargaining after the event. The overlaps between collective bargaining and joint labour-management consultation could be explained by the wide range of possible subject matters of collective bargaining. However, it is also argued that the tone of negotiation greatly differs: while trade unions tend to be more confrontational during collective bargainings, joint labour-management consultations are characterized by cooperation and mutual understanding.[631]

Another significant difference between the two systems is that no statutory regulations are governing joint labour-management consultation, however, if parties agree, the rules concerning collective bargaining could be acknowledged as binding on joint labour-management consultation and failure of adhering to them could provide a basis for an employer to refuse collective bargaining with a trade union. Also, if the procedure was established in labour-management agreement, their violation gives rise to liability in damages.[632] Agreement on such is established pursuant to agreement between an employer and a trade union, by a contract, a memorandum of understanding, or the like. These agreements share the following characteristics: the subject matter and procedures of the consultations must conform to the parties' agreement; no dispute acts may be attempted in connection with the consultation; the goal of the consultation is not necessarily reach an agreement; while parties often limit themselves to presenting information and acquiring an understanding of each other's intentions, they also reach agreements that are usually honored; the subject matter of the consultations need not be confined to the subject of collective bargaining.[633]

B Other Forms of Employee Involvement

---

[630] K Sugeno, 'Japanese Labour Law' (Tokyo, 1992, Tokyo University Press), 475.
[631] J Hajdú, op cit. 153.
[632] K Sugeno, 'Japanese Employment and Labour Law, (Tokyo, 2002, Carolina Academic Press – University of Tokyo Press), 555.
[633] K Sugeno, 'Japanese Labour Law' (Tokyo, 1992, Tokyo University Press), 476.

In Japan approximately 90 per cent of the labour unions are enterprise-based. The declining unionization rate[634] has led to the deterioration of the function of the collective negotiations for improving working conditions.[635] However, in a slow-growth market with highly diversified employment patterns, collective voice of the workers has particular significance in mitigating the adverse effects of the sluggish economy. Thus other means of employees' collective influential voice systems than trade unions have attracted attention. Two instruments, the majority representative and labour-management committee will be discussed under this section.

i The Majority Representative

Labour Standard Law incorporated the institution of 'majority representative' already at the enactment of the law. The majority representative is independent from the trade unions and is elected by the workers with a ballot. Notwithstanding the rules of the election and the qualification of the majority representative were originally not provided for by the law. Instead, standards were established in a ministerial ordinance which was later incorporated to the LSL.[636] The revised regulation in brief states that the majority representative must not hold a supervisory or managerial position and must be chosen by voting or a show of hands. An explanation of the duties and responsibilities of the office shall be given to the workers before the election.[637]

Although it is supposed to ensure that the majority representative bear the confidence of majority of the workers – including managers and supervisors too – with group dynamics described above, it is very unlikely that the employees could freely express their opinions and get engaged in a frank discussion with the majority representative.

From the beginning, the majority representative's has a consultative role; in the absence of trade union representing majority of the workers the employer has to present the work rules newly set or modified. The majority representative could provide his opinion but it is not binding on the employer. According to the 1947 version of LSL, agreements concerning overtime or work on holidays could be concluded with the majority representative.[638]

The 1952 revision of the labour code provided for that an agreement has to be concluded between the majority representative and management on the commissioned management of workers' savings,[639] payroll deduction,[640] and payment of wages during paid

[634] After a peak of 55.8per cent in 1949 it maintained a steady 35per cent until the mid 1970s, than it has been steadily declining, as of 2006 the rate is 18.6per cent (organizing 10 million workers).
[635] Wage negotiations are outside of the scope of enterprise-based unions as it will be explained later.
[636] 1998, Labour, No. 45. More on the history of incorporation could be found in Sugeno 2002: 86
[637] Lab. Enf. Regs. Art. 6-2
[638] Also only in the absence of trade union representing majority of the workers.
[639] Article 18 Para 2

holidays under the Health Insurance Act.[641] Later on other acts than LSL introduced new regulations too. The Industrial Safety and Health Act enacted in 1972 provided for that the employer ought to have the input of the majority representative on the health and safety improvement plan[642] and half of the members of the safety and health committees has to bear the recommendation of the majority representative.[643] The 1978 revision of the Workers' Property Accumulation Promotion Act stated that an agreement ought to be concluded on the establishment and amend of a property accumulation fund.[644]

The 1987 modification of the LSL and then consequently adopted regulations of the Employment Insurance Law, the Child-care and Nursing-leave Act allowed the employer to conclude a written labour-management agreement with specific effects.[645] It means that the employer is deregulated or relieved of the Law's standards by concluding such an agreement.[646] Under the agreement for example the employer is allowed to deny a request for child-care leave.[647] Worker Dispatching Act as well as the Law Concerning Stabilization of Older Persons also provides consultative rights of the employee representative. If a labour management agreement satisfies the requirements of a collective bargaining agreement, the agreement has the normative effect of a collective agreement under the Trade Union Act. When the flexible working hour system was introduced in 1987, it was provided for that a labour-management agreement is to be concluded with the majority representative; alongside the labour-management committee was introduced.

ii The Labour-Management Committee

A labour-management committee is composed by the representatives of the employer and the employees of the workplace. Half of the committee members are nominated by the majority union or in its absence the majority representative for a designated term. The establishment of the committee shall be duly reported to the Chief of the Labour Standards Inspection Office. Minutes ought to be taken on the meetings of the committee and employees of the workplace have to be given access to them. Resolutions of the committee are adopted with the consent of all committee members and have to be announced to workers in the same ways as collective agreement[648] and have to be filed at the Chief of the Labour Standards Supervisory Office.[649]

---

[640] Art 24 Para 1
[641] Art 39 Para 6
[642] Art 78 Clause 2
[643] Art 17 Para 4; Art 18 Para 4; Art 19 Para 4
[644] Arts 7-8 and 7-25
[645] Managing workers' savings, deducting of wages, adopting different working hours averaging systems, adopting a flexitime-system, adopting regulations on simultaneous vacation system, adopting discretionary working system, adopting scheme for fixed annual leave, and payment of wages for annual leaves.
[646] Sugeno 2002:85
[647] Child-care and Nursing-care Leave Act Art 61 Para 1; Art 12 Para 2
[648] Art 10
[649] Only those which are related to overtime and rest-day work

Labour Standard Law provides for the protection of committee members against disadvantageous treatment by the employer.[650]

By the resolution of the labour-management committee, the employer is allowed to defer from the standards on maximum working hour set forth by the law or the collective agreement,[651] which indeed promotes the decisions of the committee to powerful management instruments.[652] The success of the committee as a participatory instrument is based on the actual representative power of the committee.[653]

To conclude the analysis on the role of the majority representative, it is apparent that concentration of such power in a hand of an officer, whose legitimacy is clearly doubtful and therefore is unable to become a genuine actor of employee participation, could severely jeopardized the bargaining rights of the employees. This is even more striking in the light of the union coverage which shows that factually 90 per cent of the enterprises have no labour union.[654] Interestingly, the 2012 report of the Japan Institute of Labour Policy and Training reflects well on the adverse issues arising from the lack of transparency and fairness in the election and decision making processes and urges the lawmaker to establish corrective measures.[655]

C Direct Participation – Quality Circles

Partially due to the in-built rigidity of the wage system under the life-time employment system, labour productivity of Japanese manufacturing industries was the lowest of ten major OECD countries in the 1970s.[656] However, competitiveness of a firm or an industry is also depends on the quality of products or services and Japanese companies has attracted increased attention in this connection.

Scientific quality control was first introduced during the pre-war times,[657] but sincere efforts to implement statistical methods were made only after SCAP provided guidance to telecommunication companies[658] to improve reliability of their services.[659] Then the know-how was spread among companies who wished to get rid of the 'cheap and low-quality' label which had previously been a tag of Japanese products. The Industrial Standardization Law of

[650] Art 24-2-4 Para 8
[651] LSL revision of 1998
[652] Instruments include variable scheduling systems (Art 32-2 Para 1, Art 32-4 Para 1), flexitime system (Art 32-3) and discretionary scheduling system (Art 38-2 Para 2), work-time averaging (Art 32-5 Para 1), overtime and rest-day work (Art 36, Art 39 Paras 5, 6; Art 34 Para 2)
[653] Araki *:3
[654] JILPT Survey on the Framework of Employee Relations, Employment and Retirement, 2005; in accordance with JILPT Survey on the Establishment and Modification of Working Conditions and Human Resources Management 2005
[655] Uemura at all 2010:39
[656] Watanabe 1991:58
[657] National Railway Corporation and some private sector companies like Toshiba were pioneering the new method.
[658] For example to Japan Department of Communication (today's NTT)
[659] Watanabe 1991:61

1949 provided for the inspection of both manufactured products and methods of analysis. The Japanese Union of Scientists and Engineers (JUSE) was formed to encourage companies' participation and to improve standardization. The enthusiasm on the industrial side was beyond imagination. Majority of the enterprises put serious efforts in workers' education and training in the beginning of 1950s, later during the decade a study team was sent to United States to further analyse the leading methods, and JUSE launched a journal on latest developments in 1962.[660]

The accumulated rise of quality circles in the 1960s could be explained as the companies' response to the mounting shortage of qualified labour (especially engineers and technicians) in the rapidly expanding economy.[661] However, Watanabe argues that the low growth period after the oil shocks of 1970s triggered the real organizational changes at majority of the established companies.[662]

According to the Japanese Industrial Standard (JIS), the term 'quality' is interpreted in the broadest sense to mean 'everything that can be improved'. Thus quality is not only associated with products and services or the way how machines are operated, but also include all aspects of human behaviour.[663] Thus participation in the quality circles (QC) is usually a part of the worker's duty and the activity tends to extend further beyond regular working hours and usually is unpaid.

Quality Circles appear as the basic form of employee participation, a forum that unites shop-floor workers, first-line supervisors, section and middle managers and trade union officers who freely and informally discuss issues of production and possible development of work conditions. It is claimed that the operation and themes of activity of the QC is based on the workers spontaneous choice and surveys show that improvements of productivity and quality, working conditions, development of human relations are usually on agenda.

The Japanese way of operating QC is often compared to its Western counterparts that tend not achieve equally high results on productivity improvement. The difference in efficacy is often explained by the detached nature of the Western QC; it is argued that since the companies do not try to promote the movement as an integral part of corporate management, workers quickly become disillusioned and their enthusiasm gets quickly extinct.[664] As oppose to the Japanese methods, where advice and guidance on establishment of a QC are provided by either the unit manager or a special person designated as QC promoter, than workers select their circle leader among the participants, who are either chosen to become members or volunteer to do so, and as a result, 83 per cent of the total workforce is 'happily' participating in the QC activities.[665]

As Watanabe sharply points out, the unremunerated, voluntary participation of workers shall not be explained with some Confucian devotion to group harmony, but merely based on economic motivation: an uncooperative attitude would result in a poor evaluation of

---

[660] Goldstein 1985:505
[661] Japan's net GDP growth was double digit until the first oil crisis.
[662] Watanabe 1991:64
[663] Watanabe 1991:62
[664] Watanabe 1991:63 and Cole 1984:222
[665] According to the statistics of the Labour Ministry (1990), in line with JUSE's report, 2.4 million workers participate in the activity of the more than 300 thousand circles, and 60per cent of the respondents marked on the questionnaire to be 'very happy' or 'happy' with that fact.

the employee and endanger not only the chances of promotion or bonuses, but the individual's position within the group.[666]

D New Directions in Corporate Governance

The international competitiveness made the Japanese *keiretsu* a highly successful player of the economy until the end of 1980s. In the latter half of the decade, the Japanese economy still had 5 per cent of real economic growth, which was reflected in the financial and securities as well is in the companies' value. Japanese companies were acquiring foreign businesses and assets, encouraged by the impact of the strong yen. However, in 1990 when the 'bubble burst', stock prices and land values immediately began to fall. Thereafter, Japan has been experiencing a deepening recession.[667]

Parallel to the economic stagnation, the number of employees working outside of the life-time employment system has been growing and now accounted about 35 per cent of the total workforce.[668] The ratio of 'regular employees' has fallen from 80 per cent to 65 per cent. The number of new hires by the companies featuring life-time employment has been decreasing, and the proportion of regular employees at the 15-24 age groups is even lower.[669]

Traditionally, women are not participants of the life-time employment system. From the viewpoint of the system operating with exceptionally costly ways of training regular employees, women, who tend to devote 'the peak of their capacity' to their families and drop out for many years to raise children[670] are not worth the investment as their training would never be returned to the company.[671] Although in the years of economic stagnation many women have had to (re)enter the labour market,[672] though, mostly still in non-regular forms.[673]

---

[666] Also, most companies launch some kind of merit system to remunerate those workers whose contributions were significant for productivity improvement. Watanabe 1991: 75

[667] The changes in the labour market are intertwined with many other socio-economic issues, such as the well known problem of the aging population; however, in this article it would be difficult to address all aspects.

[668] In the meanwhile, unemployment ratio has been growing too, from about 3per cent in mid-1990s, it went up to 5.6per cent by 2009.

[669] 39.4 per cent among high-school graduates and 57per cent among university graduates. Source: Japan Institute for labour Policy and Training, The changes in the labour market are intertwined with many other socio-economic issues, such as the well known problem of the aging population; however, in this article it would be difficult to address all aspects. In: Current status of Youth Employment, Data series 61. 2012.

[670] The per capita nursery places are extremely low in Japan. Some places have a lucky draw to decide who will be accepted, some make interviews for parents before decision making. 26per cent of the pre-school age children attend day-care and 44.6per cent of the working mothers use such service. Source: Zhou, Osihi, Ueda: Childcare System in Japan in: Journal of Population and Social Security, vol.1.

[671] Without training though, it is impossible to be promoted to a higher level position and obtain better salaries. The wage difference between men and women is around 33 per cent, the gap is significantly bigger than in the US or Europe.

[672] The number of double-income households surpassed the number of singe-income households in 1995. Though the proportion of women in the total number of workforce has been double since 1985, it is still very low, only 15per cent. The share of women in leadership positions overall is extremely low, in the corporate sector 3.6per cent of the managers are female. Sources: Ministry of Internal Affairs and Communications, Labour force Survey; Study on Women's Participation in Policy and Decision-making

The traditional life-time employments system has had no instruments to address the changes of the labour market. Thus, changing the employment policy has become a critical issue among Japanese companies. Human resource management techniques frequently used by Western multinational corporations were implemented in the 1990s to tackle the discontinuance of economic growth.

The most forthcoming novelty in Japanese companies' human resource management policy in the early 1990s was the introduction of a performance-oriented employee assessment and compensation system, the *seikashugi.* It is argued that for the implementation of *seikashugi* system, the emphasize of wage policy shall be on business results rather than on variables such as skill, knowledge or effort, and short term business results shall be put ahead to long-term ones.[674] Focusing on the individual employee's short-term performance was strikingly new to traditional Japanese companies.[675] *Seikashugi* was rapidly gaining popularity, on average 53 per cent of the companies introduced the system by 2004, and the ratio among large companies employing more than 1000 employees was 83 per cent.[676]

Criticism against *seikashugi* was growing just as rapidly. One report – based on first-hand experiences – claimed that after the implementation of seikashugi employees lost their ambition and the vitality of the organization diminished. This experience was backed-up with a research showing that companies are not putting effort in motivation, while another provided evidence that in most companies the shift to *seikashugi* was not properly communicated and many employees did not have any information on the new system. Additionally it was argued that based on the cooperation principle of game theory, such system discourages outperforming employees.[677]

Indeed, introducing an evaluation system which puts competition ahead of cooperation out of the blue could easily affect employees' morale. With no clearly articulated paradigm-change in the values, employees loose black lines to be followed and could easily feel defenceless against management policies. Moreover, the traditional enterprise-based unions,[678] with a toolkit specialized for the protection of the seniority-based wage system, could not offer any valuable support, neither the immature participation instrument, the 'majority representative'.

Furthermore, critics pointed out another side-effect of *seikashugi*. To summarize the argument, the Japanese industry's competitive advantage is the high-quality goods which other companies cannot imitate, thus the primary interest of Japanese companies is to retain highly skilled workers who has the ability and experience to execute such strategy. More specific skills allow higher degree of differentiation from the competitors. Therefore, companies invested in its employees in a long run through OJT, and the primary instrument to retain the manpower is the seniority based wage system. Yet, *seikashugi* just contradict to the

---

[673] Making up 57.4 per cent of the total part-time workforce.
[674] Okunishi, Yoshio: [Conditions of introducing seikashugi-based wage system] Based on Labour Situation in Japan and Analysis, Detailed Exposition 2009/2010
[675] Miyajima 2008:356; Tatsumichi 2007:80;
[676] Tatsumichi 2007: 83
[677] Tatsumichi 2007: 83-84
[678] with a steadily declining unionization rate

basic strategy of Japanese businesses, as its breaks the "psychological contract" with the employees by interfering with their long-term expectations.[679]

To overcome this paradox, majority of the Japanese companies while introducing the *seikashugi* system, still maintains the life-time employment system. According to a survey,[680] 69 per cent of the companies answered that they aim to maintain life-time employments system for as many employees as possible, 21 per cent considered limiting the system to selected workforce and only 9 per cent declared that it is not a priority issue for the management. Combination of these data with those on the implementation of the *seikashugi* system reveals that 30 per cent of the companies maintain *seikashugi* together with life-time employment.[681]

IV Industrial Relations and Democratic Values

Internal democracy of the unions is a central part of democracy studies all over the word, and Japan with the Occupation's manifest influence on industrial relations is not an exemption. More than 60 years after the end of the war, not too many workers remember either the pre-war organizational relations or the drastic changes of the 1950s, most of today's union members and leader have been raised in a democratic environment. Does it mean that democracy and democratic values have become inherent part of their lives? Or, does it mean that contemporary union activities reflect to these principles?

Industrial relations are guarded by the principle of free bargaining, meaning that both labour and management enjoy freedom of association and autonomy including collective action through bargaining. The major arena to exercise such freedom is at enterprise level.[682] Their activities cover negotiations with management to improve living and working conditions of workers, members' activities within the union and external relations, such as campaigns and lobbying.

Bargaining matters are very broad, it is generally accepted that unions have rights to bargain even on management issues, and only those topics are excluded which are clearly beyond the management scope, such as political issues or affairs of other companies.[683]

The primary organization at national level for unions representing employees is Rengo (Japanese Trade Union Confederation), while on the employers' side the main organization is Nippon Keidanren (Japan Business Federation). However these organizations are well established and unite great number of affiliates, social dialogue is not restricted to the channels provided by them. Since the 1970s informal ways have been gaining excessive

---

[679] Tatsumichi 2007: 85

[680] Attitude to long-term employment for regular workers. Labour situation in Japan and Analysis: Detailed Exposition 2009/2010 p. 107

[681] And named as "New Japan Type" of companies by the researchers

[682] 90per cent of the unions are organized at enterprise level, as it was demonstrated above.

[683] Hanami 1989:285

popularity and methods developed outside the official routes are widely praised and examined internationally.[684]

The oldest among informal bodies is Sanrokon. It held its first meeting in January 1970. It has about 25 members, including trade union representatives, business leaders, government representatives and even academics.[685] According to its inauguration document, it does not have a tripartite structure common for social dialogue. Sanrokon is not a formal decision making body either, but claims to be a forum for free discussion which provides opportunities for the government to present economic policies and for labour and management to make requests and proposals for the government.[686] Sanrokon with a continuous operation of 40 years mirrors the development of social dialogue very well. However, there are other organizations which are taking an active role in forming industrial relations, like the Labour Policy Council that operates numerous sub-commissions and work groups, or the Minimum Wage Council. Apart from the tripartite (or tripartite-looking) organizations, there are countless forms of bilateral formations.

Even though the bargaining subjects are already broad, the informal channels of social dialogue with their voluntary, constructive and non-invasive nature have opened the door for topics which were originally non-mandatory. By this means, now parties are free to discuss technically all matters relevant for industrial relations - an admired practice worldwide.

Despite of the great many informal opportunities, employee involvement is generally very low, especially on levels higher than the enterprise. This is commonly explained with the lack of legal basis for employee involvement in general and work councils in particular.[687]

The importance of workplace-level involvement is primary for those who belong to the life-time employment system. During the ordinary course of one's career, industry or national level negotiations make little effect, as they unlikely to have an interference with the external labour market. Thus enterprise-based unionism best represent the regular employees' interest to achieve the best possible working conditions for the internal labour market. However, the most apparent pitfall of enterprise-based unions is the weak bargaining power. To overcome this shortfall, a compensatory system has been developed, the *Shunto*. The *Shunto*, or with other words, the 'spring wage offensive' is a mechanism to coordinate enterprise based collective bargaining for wage increase across companies and industries.[688] Seemingly, employees have little to worry about: unions (where exist) are able to bargain on almost everything, wages are taken care by *Shunto*, informal ways of social dialogue unify labour and management.

The 'Japanese miracle', the rapid growth of the economy and striking success of Japanese companies on both domestic and international markets after the wartime destruction directed much attention to Japanese industrial relations, which are often characterized as harmonious. The consensus-oriented decision making processes of management was also put

---

[684] Araki 1993-1994:146

[685] Including the president and vice-president of Rengo (the latter doubles as president of Sanrokon) and president of Nippon Keidanren.

[686] Recently was on agenda of requests: cutting taxes, improving vocational training, upgrade social insurance, quicker enactment of laws; Sanrokon has made proposals to the government only twice since 1970, the first one was related to consumer prices and the second one to inflation measures.

[687] Hanami 1989:286

[688] Araki 1993:145, for Shunto in general see Sugeno 2002:553

into spotlight as a backbone of economic democratization. However, recent works of Japanese and Western scholars tend to question the generalization that harmony and consensus are able to describe or to explain the industrial relations in Japan.[689]

The term 'democracy' means the same to Japanese workers as to their Westerns counterpart: a form of equality, a voice in political processes, freedom and individual participation in politics. What differs is the meaning ascribed to these notions.[690] The SCAP treated unions as "schoolhouses of democracy" and even officers consider unions as the "foundation of Japanese democracy".[691]

The unions' general meetings are held usually twice a year. The carefully planned and predictable structure of these gatherings in itself bans spontaneity and since the agenda leave no space for open discussions, the contribution of the workers' is restricted to their mere physical participation on the venue.[692] The order of speeches is also pre-set: first Diet members (if any), leaders of affiliated labour movement organizations, then officers of the enterprise union deliver their speeches. Proposals are already printed out and handled to the participants.

As Turner's research shows, union meetings are default setting of the group-interaction described in the first part of this paper. Union officers are pursuit of personal power and status accumulated over union hierarchy, while rank and file employees have not much of choice but to listen carefully during the union gathering and remain silent. Since the hierarchical relations set the rules for the discussions, the conversation is one-way. Even rank-and-files who dare to express their opinions suppose not to disagree openly with their supervisors and should use the 'correct language'. Union leaders on the other hand often use attitude and language which shows inequality for the inferior of the workers.[693]

The threat that someone becomes the one who disturbs the harmony of the group could easily be converted to monetary loss. This personal insecurity was detected by Turner too; workers often explained their passivity by the ultimate fear of losing their jobs and therefore of endangering their (and their families) livelihood.[694]

Based on Nakane's analysis on group dynamics it is easy to see that such environment does not nurture open discussions and eventually leads to apathy of the workers towards union activity, which is widely recognized among union leaders too. Rank and file workers seeing themselves as victims of traditional powerlessness topped with a concrete experience of weakness within their unions are enough to the develop political passivity.

As Turner explains, "[the] consequence of these self-images is a feeling of political sovereignty in the abstract sense of belief in the ideals of democracy, but with a very low level of political efficacy in their daily encounters with the political processes within their own unions."[695] This sense of powerlessness contributes to the fact that employees feel themselves rather like subjects than participants. Frustration occurs when decision are made

---

[689] This section relies on the fieldwork of Christena Turner, an anthropologist and Adjunct Associate Professor of University of California, San Diego; she is the director of UCSD's Program in Japanese Studies.
[690] Turner 1989:302
[691] Turner 1989:309
[692]Turner 1989:318
[693] Turner 1989:317
[694] Note that households with one income were in gross majority until recently.
[695] Turner 1989:314

by the employer affecting the daily life of the employees, without sincere consultation and tension between labour and management remains, but well covered by the indirectly forced silence of the former one. Anger and betrayal are, in turn, lead to apolitically.

V Summary

The research question concerning this chapter was (Q7) was *how the traditional decision making patterns influence employee Involvement in Japan?* Japan has been treated as the fortress of industrial democracy mostly because of the well-established informal ways of participation. However, in reality it is much hindered by the lack of actual democratic conduct within the workplace units, including trade unions. The Japanese life-time employment system, such as the long-lasting feudal patterns, the paternalistic benevolence of the employer, and the traditionally submissive behaviour of the employees and the controversial nature of decision making would not encourage genuine participation either. The exaggerated hopes in the reinforcement of the informal ways of participation are only able to masquerade the inherent conflicts between labour and capital, but cannot substitute the genuine democratic decision making processes. As Otto Kahn-Freund warns us, the false belief of "unity", meaning that there are not really two sides of the industry, would easily lead to suppression of trade union activity and paternalistic attitude of the employer towards its employees, yet there is no possibility to eliminate the conflicts – the immanent ingredients of all industrial societies.[696]

Another question is whether a conflict-free industrial relation would be beneficial for its participants? I believe that the answer is negative. Conflicts are essential elements of democracy of all kinds, social, economic, political or industrial. In addition to the latter one, Kahn-Freund further argues that any approach to understand the relations between labour and managements is fruitless without the recognition and articulation of the divergence of their interest.[697]

Not denying the importance of joint accountability and collective achievements as an ethical integrating power of the community under certain circumstances,[698] the principal of personal responsibility shall however be emphasised. To empower human dignity one must not accept that anyone else has the rights to impose personal values on others without that person's endorsement.[699] However, as Kahn-Freund stated elsewhere, freedom is ambiguous and misleading in labour relations, as the employees' will is only legally, but not socially free; thus the principal purpose of labour law is to support the balance between the power of management and labour. Nevertheless, legal regulations are secondary in influencing the

[696] Kahn-Freund 1972:20
[697] Ibid. 18.
[698] Dworkin 1998:455
[699] Ibid.

forces of the labour market, and can only make a modest contribution to the degree of effective organisation of the workers.[700]

Japan is an excellent example to demonstrate how little effect the text of the law has on workplace democracy. The Japanese labour law system – greatly influenced by the Occupation forces – calls for an egalitarian social structure: trade unions are uniting both management and rank-and-file workers and the letter of the law insures different forms of participation. On the other hand, despite of the numerous efforts companies have made to adopt a more open corporate culture by introducing human resources management ideas from the West, there has been no noticeable breakthrough to achieve genuine participation.

By the beginning of the 21st century 34.6 per cent of the total workforce[701] is being employed outside of the life-time employment system. For them the trade unions tend not offer any protection, as the unions' solutions are solely built up to shield the regular employees, often against the non-traditional workforce.[702] Moreover, there is slowly but steadily growing number of workers, usually from the younger generations, who do not wish to participate in the life-time employment system. Due to its in-built rigidity, the system cannot handle the growing number of workers who do not fit the original pattern, apart from labelling them as *atypicals* or *freeters*. Adding that 90 per cent of the companies do not have trade union representation at all,[703] altogether over 16 million people have no access even to formal protection against managerial power. However, without democratic workplace culture these workers do not have confidence that they are capable to protect their interest. They are treated as rule-breakers and there is no agreed social outline how to set up their own protective mechanisms.

To achieve industrial democracy a balanced labour regulatory environment and flexibility which provides space for social dialogue are prerequisites, yet alone are insufficient measures. Self-confidence and individual responsibility cannot be developed without cutting the ties to paternalistic corporate cultures.

[700] Kahn-Freund 1972:3-16
[701] Not including those who work in the agriculture and fishery sectors.
[702] Hungler 2011
[703] Source: Labour Force Survey, Ministry of Internal Affairs and Communications, 2006

Chapter 2
Participation during State-Socialism in Hungary

I Workers' participation in Hungary from 1944 to 1949

A Grass-root Participation Movements

Fights were still raging in the Western part of Hungary when in late 1944 workers set about re-starting production in the unserviceable factories through the shop committees [*üzemi bizottság*]. The Hungarian Communist Party soon recognised the potential in institutions based on workers' participation, and tried its best to harness it as fast as it could.

Until the *year of turn*[704] it launched attacks employing a varied set of tactics to augment its influence, and kept strengthening its powers systematically in enterprise level participatory institutions. These years saw first the blurring of the limits, and then the gradual elimination of shop committees' participatory functions, and trade unions' interest representation roles. The official communist party rhetoric marketed the process as the maximisation of workers' interest representation; however, the actual objective was the termination of the democratic institution of participation.

Re-starting production became increasingly urgent in the last weeks of the war. It almost goes without saying that the workers contributing to re-starting a factory also wanted title to manage the same facility. In many instances the elected shop committees spontaneously prior to the appearance of the decree on the creation of such shop committees.[705] Meanwhile the most necessary departments were set up in the Ministry of Industry; however, the most important body of communication between shop committees and workers – until the government moved to Budapest – was the Trade Union Council. It happened rather frequently that the Ministry of Industry appointed company directors relying on the opinion of the Trade Union Council. The Trade Union Council gave its recommendations based on two criteria: "*the company should come under the management of*

[704] The year of turn was 1948 when the Hungarian Communist Party forced a merge with the Social Democrats to form the Hungarian Working People's Party with the leadership of Mátyas Rákosi, which marked the onset of undisguised Communist rule in Hungary.

[705] The minutes often, even at the elections – perhaps out of habit – call it its previous name, and later corrected it in hand to *factory committee* or shop committee. See, Archives of the Institute of Political History (*Politikatörténeti Intézet,* hereinafter PIL*)* PIL 274. f. 20/ 21. ő.e.

a good professional, and possibly our reliable comrade."[706] That was important for a number of reasons. On the one hand, the Trade Union wished to maintain its clout in the shop committees. On the other hand, however, it was also important for the workers as in many cases they were unwilling to cooperate with former managers or workers who had served the Nazi system. In such cases the recommendation of the Trade Union Council was a guarantee concerning the candidate in the elections.

The shop committees maintained a relationship as close as they could with the Trade Union Council, and turned to it – in addition to technical assistance (supply of power, and coal) – also for organisational/operational advice. The Trade Union Council did its best to establish contact with each factory, and to provide effective help with the shop committee elections. The rights and obligations of shop committees were laid down by Minister of Industry Decree No 50.100 of 1945, issued on 17 February 1945 prescribing that all employers employing more than 50 must elect a shop committee. The decree requires the shop committee's authority to include the control of factory management and production, settling wage related issues, and to take charge of welfare and social questions, and authorised the shop committee also to represent the interests of the workers in disputes with the employer. However, the language of the law fell far short of clarifying the role of shop committees.

Organising the country's reconstruction was hindered by the uncertain legal situation, and so the need for re-regulation emerged in the spring. The Trade Union Council drafted a new decree joining forces with the shop committee, and economic experts; it set up a Shop Committee Secretariat, and conducted a questionnaire-based survey, and even organised a shop committee congress, a rather heroic undertaking in the spring of 1945. As a result of hard preparatory work on 5 June 1945 the Minister of Industry issued a new decree on shop committees,[707] which brought doubtful results despite being driven by the best intentions.

i Legal Framework

The reason for issuing the decree was to "gain appreciation to work as one of the most important factors of production, and to re-start the currently inoperative companies, ensure continuity of their operation, and [to organise] economic life after the war."

The Decree referred the election of shop committees in the competency of trade unions (given their experience in this field).[708] The employer was therefore under obligations to secure both personnel and infrastructure.[709] The election list had to be made to ensure that each trade (eg, carpenter, blacksmith) as well as each category (officials, engineers, section managers) should be represented.[710] In the elections the workers and the officials of the enterprise voted for a different set of candidates, but the members elected participated jointly

[706] Ibid. supposedly also on the basis of the template which was distributed among the members of shop committees by the Trade Union Council.
[707] Decree 55 000/1945. IpM, 5 June 1945.
[708] Section 2 Para 2.
[709] Section 2 Para 4.
[710] Section 2 Para 5.

in the work of the committee.[711] The size of the committee depended on the number of employees at the company.[712]

Committee members performed their duties during working hours, and their wages were not allowed to be lowered on account of their activity in the shop committee, and no other disadvantageous action was permitted against them for the same,[713] moreover, they were subject to a redundancy ban, and even in the event of downsizing their dismissal was only possible subject to approval by the trade union.[714] Members of the shop committee all took an oath of impartiality in their proceedings, which also bound them for confidentiality.[715] The decree required the costs incurred by the works committee' to be covered by the employer.[716]

The Decree gave authority to shop committees regarding all issues related to work (wages, working time and resting time, and helping employees enforce their rights deriving from the working relation); employees' common economic and welfare related interests (family protection, health related equipment, occupational safety issues, accident prevention); cultural and welfare matters; disciplinary issues (amicable settlement of labour disputes); all issues of working conditions, working schedules, working morale, and working discipline with a view to promote better, more economical, and more effective production; introduction of new working methods; controlling the plans and the progress of production at the factory.[717]

While already the repetitions in the Decree and its general phrasing made the works committees' competence difficult to understand, it also left numerous issues unregulated in respect of specific rights. Contemporary minutes[718] demonstrate that the National Industrial Grievance Committee experienced enormous difficulty trying to decide how to settle production related disputes, or how to interpret the difference between Paragraphs 1 and 2 of Section 16, ie, the question whether the chairperson of the shop committee was responsible for directing the company, or only the shop committee.[719] Decision in a particular issue often dragged on for months, thereby partly preventing flawless operation, and partly exacerbating the working relation of the employer, and the shop committee.

The above suggests that the works committee's thus established encountered a variety of difficulties. The Trade Union Council tried to capitalise on their legally uncertain position

---

[711] Section 2 Para 7.
[712] Section 2 Paras (8)-(9): with employee representatives: representing 20-150 employees: 3 ordinary, and supplementary members, with 150-200 employees 4 ordinary members, and 4 supplementary members, and above 200 employees 1 ordinary member, and 1 supplementary member for each 200 employees, and above 1000 employees 1 ordinary member, and 1 supplementary member for each 500 employees with the restriction that their number must not exceed 25. As regards the representation of officials: 1 ordinary member, and 1 supplementary member from 5 to 15 employees, 2 ordinary members, and 2 supplementary members from 15 to 100 employees, 3 ordinary members, and 3 supplementary members from 100 to 200 employees, and above 200 employees 1 ordinary member, and 1 supplementary member for each further 200 employees with the restriction that their number must not exceed 5.
[713] Section 5 Para 2.
[714] Section 14 Paras 1-3.
[715] Section 5 Para 1.
[716] Section 5 Para 3.
[717] Section 6 Para 1.
[718] Trade Union Archives (Szakszervezeti Levéltár, hereinafter, SZKL) 1. f. 6/758. ő. e.
[719] That issue regularly emerged at the sessions of the Trade union Council, and the party conferences of the MKP.

to maximise its influence over them. In his speech held to trade union lecturers on 12 June 1945 János Kádár said the following:

> "*The shop committees are under the general direction of the trade union movement, but I must note that they should be under an even closer direction of the trade unions. Although the shop committee is not a purely a professional organisation in the factory, still, regarding its operation, and its authority, it practically fills the role of the old trade union bodies; shop committees have exactly the same duty as the trade unions, namely to protect the economic interests of workers, to which a new, and in fact dominant task was added that they should play the controlling, and managing role in production. Both the [economic] and the political importance of these shop committee's is particularly great."* [720]

The Trade Union Council interpreted the decree in its narrow sense, and János Kádár also stressed the same: "*[the] task of the shop committee's is not to manage the factory, but to control the way it is managed (...) the most important point of the party's entire policy [and of the reconstruction] is what is created under the shop committees, ie, the cooperation*[721] *with the capitalists.*" Paradoxically it was exactly this speech that – even if quite briefly – the very essence of the institution of participation came up: the cooperation of employees and the employer in order to promote shared economic interests. At the same time it was the first step on the way to blurring the limits of the activity of works committee's and trade unions, which determined the relationship of the two institutions for decades to come, and greatly contributed to their dysfunctional operation up to the present day.

Integration of shop committees into the trade union formed part of centralisation endeavours, a process that started as early as June 1945. Centralised management was improved by creating a shop committee trade union unit within the Trade Union Secretariat.[722] The Trade Union Council gave the following justification for creating the group: *"Changing the role of the trade union, the organisational change in the trade union movement, and especially the necessity arising from the separation of [shop committee], and the trade union requires that the enterprise level trade union organisation should be created in the factories."*[723] The group's operation already foreshadows the concept of democratic centralism: "*Forming any local group strictly required the headquarters' approval, and electing the management of the local group is only allowed in the presence of a representative of the headquarters. The headquarters*[724] *exercised control over the activity of the local group. The headquarters could suspend the management of the local group as soon as it deviated from the principles laid down in the statutes (...). The headquarters represent*

[720] János Kádár: A szakszervezetek és üzemi bizottságok a gazdasági újjáépítés szolgálatában (előadás a vidékre indulók előtt, [Trade unions and works committees in the service of economic reconstruction (lecture to those leaving for the country)], script. 12 June 1945. PIL 274. f. 20/1. ő. e.
[721] Ibid.
[722] PIL 274. f. 20/30. ő. e. (d.n. 24 June 1947 – 22 November 1947)
[723] Ibid.
[724] meaning: Factory secretariat of the Trade union Councils

themselves, and have the right of verbally contributing at the sessions and all organisational actions of the local group.'[725]

The tasks of the trade union member of the shop committee were likewise settled in an internal rule: "*If he experiences an irregularity, or notices some circumstance that goes against the trade union's interests, he will immediately report it to the headquarters. And even until further action is taken, he will take measures required by the immediate situation.*"[726]

B The Brief Existence of Shop Committees

It was important for MKP – also in order to increase its role in the Trade Union Council – to elect its own members in position at shop committee elections. The party had prepared for the elections well in advance. In his report of 19 December 1945 Antal Apró informed the Political Committee of MKP's Central Management of the work done by the shop committee's that far. In his report he stresses all along that shop committee's did not perform their work properly as they unnecessarily shouldered the task of supporting the workers, and procuring raw material and semi-finished products. He found that shop committees were distanced from workers having spent most of their time doing office work, and protected the interests not of the employees, but of the enterprise, and also offered shelter to officials with political convictions contrary to communism.[727] They neglected issues of working procedures, factory morals, work discipline, and accident prevention. He likewise found a great deal to condemn in the area of control: few factory committees did their work with any consistency, and they hardly used the services of auditors to control business books even though there was regulation entitling them to do so. According to Apró, this could have happened because there was no appropriate central direction over the shop committees, and the trade unions joined the work of the shop committees' too late.[728] Re-election was – so Apró thinks – justified by political considerations, and insurance of continuity of production.[729]

Antal Apró suggested that run-up to the elections and the elections themselves had to be performed 'in a planned manner' 'involving party organisations and trade unions' in accordance with the renewed agreement of the two workers' parties concluded on January 21, 1945.[730] Also, in his report he warned MKP that on compiling the list of candidates attempts must be made to ensure agreement with SZDP, and care must be taken that MKP's candidates

[725] PIL 274. f. 20/30. ő.e.
[726] Ibid.
[727] The reference is primarily to members and non-member leaders of the Smallholders Party.
[728] It is questionable in the light of the above what time Apró would have found appropriate for the purpose.
[729] And not least the fact that the mandate of the members of the shop committee was for a year (decree 55 000/1945. IpM Section 3 Para (1).
[730] Two parties of the Trade union Council agrees that they would work together 'like siblings' on building and reinforcing the workers organisations. Under the agreement the MKP was given the secretary general position, i.e. an operative role, while the SZDP was given the role of president (its president was Miklós Vas-Witteg (SZDP), and its secretary general István Kossa (MKP)). For a more detailed explanation see, J Lux, *A magyar szakszervezet történetéből* (Budapest, 2008 Friedrich Ebert Foundation), 86ff.

should not have won excessive majority because – such a result not reflecting real power ratios – would have been disadvantageous for MKP. Instead, he placed the emphasis on maintaining 'party discipline', and warned of seeing 'communists working in the management of important professions' 'come under the control of 'tricky social democrats'.[731]

MKP's strategy crystallised around the concept of scapegoating: "*It must be emphasized that anti-communist officers were those who hampered smooth operation. Examples shall be given below. The work of the outgoing works committee must be criticised with a few well-prepared short speeches, and contributors should also make proposals concerning the work of the new shop committees. (...) Workers must be warned of exposing, and rendering harmless agent provocateurs"*[732] MKP's propaganda efforts at enterprise level proved successful in the capital city: in 630 factories in Budapest and its vicinity 1889 out of the 3700 elected shop committee were under the control of MKP, while SZDP won over only 1725.[733]

Unclear functions of interest representation led to a point where even after the shop committee elections workers did not have a clear picture concerning the shop committee's competency. Separation from the trade union's activity was made more difficult by overlapping membership; the head of the works committee, and the trade union bodies were often one and the same employee. Already before the elections the idea emerged that the shop committee decree should be amended by the Trade Union Council. The session of the National Industrial Grievance Committee formally requested the representative organisations to make proposals concerning the amendment of the decree on 30 October 1946.[734] Quite novel proposals were put forward in the Trade Union Council: "*The [works committee] board should be neither too small nor too big. (...) 7 people per trade union should be appointed*."[735]

However, the decree has never been modified. The authority of shop committees, instead of being clarified, was gradually shrunk. Still in May 1946 they passed the decree on the creation of the industrial production council, and the production committees.[736] Thus, production committees [*termelési bizottság*] were set up, charged with the responsibility of elaborating new working methods, production procedures, performance standards, and wage payment principles to ensure increased, and more efficient industrial production.[737] Both the employees' and the employers' side was allowed to delegate two members each to the committees. One of the members to be delegated by the employees was appointed by the Trade Union Council, and the other by the Trade Union Committee "that controls the works committees of the companies concerned."[738] That phrasing is suggestive of the institutionalised hierarchy between trade unions, and shop committees. It is also obvious that

---

[731] PIL 274. f. 20/33. ő. e.
[732] PIL 274. f. 20/30. ő. e.
[733] Lux, supra, 86.
[734] Minutes of the session of the National Commercial Factory Decision Making Committee on 30 October 1946 SZKL 1. F. 6/758. ő. e.
[735] Ie, not elected, but called in based on their achievements in the movement; PIL 274. f. 20/30 ő. e. Notes to the development of the factory committees' work.
[736] Decree No 6.540/1946. M. E. on the Organisation, and operation of the industrial production committees [?], and the Industrial Production Committee [Termelési Bizottság] (31 May 1946).
[737] Ibid. 1-3.§§
[738] Ibid. 2.§

the creation of the production committees openly deprived the shop committees of their authority granted to them in Section 6 Paragraph 1 point e) of Decree No 55.000 of 1945.

Production processes started up in the wake of nationalisation, and the first three-year plan gave workers the hope of an improving economic and social situation. Already at the second national congress of the shop committees[739] the implementation of the three-year plan was the main issue. But trade unions were also looking forward with great expectations to the creation of the so-called planning commissioner [*tervmegbízott*], the new institution of workers' control at workplaces.

Government Decree No 8530 of 1947[740] brought the Plans Office under the Prime Minister's supervision. The latter's mission included designing plans, controlling their implementation, and preparing action required for their successful completion. Decree No 10.520 of 1947. M. E. was issued pursuant to power granted by the government decree, which obliged the factories to form factory plan committees [*tervhivatal*].[741] The plan commissioner working in the factories was appointed by the head of the enterprise at the shop committee's proposal, and such appointment was in effect until revocation. The creation of the institution of the plans commissioner was another move to reduce the tasks of the shop committees as production control had belonged under the – ever so vaguely described – authority of the shop committee. The task of the trade union work communities practically squared with that of the production committee, and the purpose in creating them was to help design the trade union's uniform economic policy.[742]

Creating the trade union work communities – setting the aim of increasing production efficiency – again resulted in a race of institutions of identical roles lost by the shop committee, the democratically elected body of employee control as its existence became more and more difficult to justify. At the same time wages continued to stagnate, moreover, with the raising of personal production quotas wages *de facto* dropped,[743] resulting in worsening living conditions. The workers' dissatisfaction rose,[744] and their trust in their self-elected bodies dwindled simultaneously.

MKP planned to mitigate the ensuing tension by embarking on political cleansing. They first looked for the enemies of the people's democracy among trade union representatives and later the shop committees were also added to the list of institutions to be cleansed. As nationalisation progressed, the control function of shop committees grew more and more embarrassing for the centralising political powers. A note made by the Factories Committee of the Trade Union Council said:

"the right that they can interfere with the management of the [privately owned] company, and the intention that the works committees should have the last word in every issue is a powerful weapon in the hands of the [shop committees]. And if now they wish to

---

[739] 18 July 1947.

[740] Government Decree Bo 8.530/1947 on the Creation of the Plan Economy Council, and the National Planning Office (Magyar Közlöny (1947)) 158-59.

[741] Subpara. c) of para. (1) of article 1 of decree 10.520/1947. M. E. on the Plan commissioners (5 September 1947) requires the appointment of a plan commissioner at factories operating under the part plan 1.§ (1) c).

[742] Note of Ferenc Zala, head of the Economics, and Statistics Department of the Trade union Council 6 May 1947 SZKL 1. f. 6/254. ő. e.

[743] Summary report concerning the work performed in November 1946 by the production committees. SZKL 1. f. 6/317. ő. e.

[744] Work was stopped multiple times. See also: Lux, supra, 95.

use that weapon in nationalised factories against the employer, ie, the state, they will often come face to face with themselves. The shop committees should be made to understand that in nationalised factories the decisive issue is no longer the control of the production process, and the direction of the movement of goods,[745] *but that the program proposed should be complied with*."[746]

That note appropriately reflects the position of the now cleansed Trade Union Council, and – through it – that of MKP whereby in a plan economy there was no need for the control function of works committees, and – through them – for the employees' control either.[747] The role that the Trade Union Council meant to allocate to the works committees reduced the latter to an unserious institution: its role was specified as solidifying work discipline, propagating nationalisation, and legalising the leading role of the Centre of Heavy Industry [*Nehézipari Központ,* NIK][748]. The idea of increased centralization was not uncontested, records suggest that many factories like Ganz, Waggon, MÁVAG, and the Weiss Manfred Factories were against the initiative.[749] Here the work of the shop committees was supplemented by popularising NIK among the workers through satisfying simpler requests including providing drinking cups, and keeping toilets clean.

The role of the trade unions, too, changed. In accordance with the new guidelines, their main task is to organise, increase production, and organise socialist work contests, and rationalising work processes in the factory, completely overshadowing the role of interest representation. As a parallel process their independence dropped paving the way for MKP's political committee to declare on June 4, 1948 that the trade unions must serve the party. Thus it came as no big surprise that, following the merger of MKP and SZDP, it was announced at the 17th Trade Union Congress that the main task of the trade unions was to cooperate with the party organisations, and subordinated trade unions' work to the party unit in all areas deforming the true mission of trade unions for decades to come.

The 17th Congress – after Antal Apró's announcement on behalf of 1.6 million workers that "*we will follow the Soviet Union's peace policy for life and death*"[750] – suggested that the shop committee and the trade unions must be unified, and control over the shop committee must be made the duty of local trade union management.[751] The trade union committees came to existence[752] with a mission practically identical with that of the shop committees', apart from the latter's supervisory function over the enterprises' operation. Concerns were dismissed by István Kossa in his speech, perhaps not in an overly sophisticated manner: *"[t]his is a trade union task, all it requires is to re-assess the trade*

[745] In an attempt to act against the black economy, the shop committees followed the finished goods produced to the market as much as they could.
[746] PIL 274. f. 20/30. ő. e.
[747] See also Lux, supra, 97 and 99.
[748] The Centre of Heavy Industry (NIK) formed in December had the mission of holding together the nationalised iron, metal, and metallurgical plants, and the machine factories. After nationalising the factories employing at least 100 workers (the so-called 'Good Friday nationalisation'), on 25 March 1948 the ratio of state ownership grew to just below 100per cent in the metallurgical industry, and above 90per cent in the iron, metal and machine industry. The NIK terminated in 1949.
[749] PIL 274. f. 20/30. ő. e
[750] UMFI Hungarian newsreel 33
[751] Lux (2008: 103.)
[752] Lux (2008:100)

union's role". [753] Following the 17th Congress, and simultaneously with the sector reorganisations, the process culminated in the creation of the trade union's standardized enterprise based organisations [*üzemi alapszervezetek*] by the National Council of Trade Unions [*Szakszervezetek Országos Szövetsége*, SZOT] [754] in 1949, which brought the curtain down on shop committees once and for all.[755] That was the end of the democratic institution of employee participation until 1992.

II Workers' Councils Movement in 1956

A Setting the Scene

When the crisis of political power caused industry management to become paralysed, workers again took charge of direction during the 1956 revolutionary events. The workers councils [*Munkástanácsok*] established in October 1956 played a special role among the fast changing conditions.[756]

The first workers' council in the capital city was elected by the workers of *Egyesült Izzó* Factory on October 24, 1956, and numerous other factories followed suit. As opposed to the 1945 shop committee movement, this time the election of the enterprise level organisations was followed by units of a higher level: workers councils were at district, and city level, but even at the counties. It was also apparent that the units that were set up at a particular level strove to create horizontal relationships.

Initially the efforts of workers' council was focused on directing production, providing for the needs of workers, and taking charge of personnel issues: in several locations they seized the documentation of the personnel department, and started to work out a new, and more equitable standard, and wherever fights erupted, the factory had to be also defended. At several locations such as at *Egyesült Izzó*, the factory manager was also replaced, but in more extreme cases, like in *Hazai Fésüsfonó és Szövőgyár* (HSZF), the first days of the workers councils were not without bloody scenes of a retaliatory character.[757]

In political questions, however, unity was by far not as strong. The workers councils' flyers and notes had mutually contradictory slogans and claims. In many cases the withdrawal

[753] István Kossa (20 February 1948)
[754] The Trade union Council changed names at the 17th Congress.
[755] All resolutions passed at the sessions of SZOT (National Council of Trade Unions) 22 February 1949. in, 'A SZOT teljes ülésének határozatai, 1949. február 22. A magyar szakszervezeti mozgalom válogatott dokumentumai II. k. (SZOT Központi Iskola kiadása, d.n.) 470-473.
[756] E Beránné Nemes and E Kajári, *'A munkástanácsok és a szakszervezetek (1956-1957)'*(1992) 2-3 Múltunk;
[757] In HSZF, Kálmán Turner, one of the communists of the factory was murdered in his apartment. Later, in memory of the retaliation the KISZ organisation of the district workers militia [*munkásőrség*] assumed his name.

of Soviet troops and the restoration of general and secret voting rights were the central element, but there were also notes instructing workers what to do with their volumes of 'The complete works of Stalin'.[758]

In a matter of days the workers councils achieved decisive majority across the country, and were strong enough not only to take the workers on strike, but also to get them back to work as soon as many of them expressed confidence in the government in late October.[759]

An important point in the organisation of workers councils was the convocation of the workers councils' parliament on October 31, 1956 with the participation of the delegates of 24 large factories. The parliament accepted the basic principles of the workers councils' rights and operation regulating the relationship of workers, workers councils, the director, and the state. Thus, it was established that the factory belongs to the workers, who pay tax and profit share to the state. The democratically elected workers councils were appointed as the company's supreme decision making body to which the director must have reported. The director, who was the enterprise's employee, was elected by the workers councils through an open application system. The workers councils' decision making rights extended to approving the company's plans, determining, and spending the wage budget, concluding foreign transportation contracts, transacting credit deals, deciding disputes concerning starting and terminating employment relationships, approving the balance sheet, deciding on what to do with the profit, and handling social issues.[760]

The Basic Principles was the culmination of the preparatory work of previous months laying the foundations of worker self-government. It is interesting that at several points including planning and concluding contracts it vested authority with the workers councils, and through them the workers within the framework of the prevailing system. Referring the enterprise's management in the competence of the workers councils was not only the worker's criticism of the centralised management of the economy, but at the same time also the criticism of the trade unions' activity.[761] Workers councils could not, therefore, be regarded the continuation of the trade union movement, but are the outcome of a new grass-root initiative.

Although the idea of democratising the organisation, and cutting down on red-tape emerged in the trade union movement, with the replacement of Imre Nagy[762] the plans gathered dust for almost three years, and SZOT only placed the issue of worker representation on its agenda in September 1956. The question of interest representation re-surfaced along with the involvement of workers in decision-making on living and working conditions

---

[758] Pittaway (2006) and Beránné-Kajári (1992:71); on the historical role of female leaders during the revolution see, E Zs Tóth *'Kádár leányai – Nők a szocializmus időszakában'* [Daughters of Kádár – Women in the socialist era] (Budapest, 2010, Nyitott Műhely) 33-52.

[759] Eg, in Borsod county miners were not involved in the industrial action due to their obligation of ensuring an uninterrupted supply of fuel. Quoted by Beránné-Kajári (1992:71)

[760] The workers councils' programs was influenced by Polish and Yugoslav examples aimed at the democratisation of the factories, of which the contemporary press gave numerous accounts. E.g. the press conferences by the Information department of the Ministry of Foreign Affairs, or articles in the daily paper Népszava. Quoted by Beránné-Kajári (1992:73)

[761] Beránné-Kajári (1992:72)

[762] Imre Nagy was a Hungarian communist politician who was appointed Chairman of the Council of Ministers of the People's Republic of Hungary on two occasions. Nagy's second term ended when his non-Soviet-backed government was brought down by Soviet invasion in the failed Hungarian Revolution of 1956, resulting in Nagy's execution on charges of treason two years later.

(including the issue of work-force management). Further points discussed included the right of workers to make proposals, or deliberate on appointing and dismissing leading officials, wage related issues, and division of profit. The possibility of exclusive competence in the area of the work contest also appeared.[763]

That Basic Principles pointed much further than the question of internal democratisation of trade unions, and claimed the comprehensive reform of the political system. A further important element was that, instead of stressing the common interests of state and trade union, it placed emphasis on the different approach of otherwise common aims. At the same time the proposal did not move away from the plan-driven, centralised control of production, and from the principle of the single-person company management. And it wished to acquire the right of participation not for some newly created independent body, but for the trade union.[764]

Yet, workers, and political public discourse kept the issue of worker management on the agenda, and even the 'Petőfi Circle'[765] and the association of Hungarian writers included in its program the claim of workers to manage themselves. Following SZOT's session, in conflict with the draft, the transformation of the works committees began as a grass-root initiative.[766] As SZOT was unable to influence that process to the slightest extent, overwriting its earlier decision, it eventually decided for the transformation of works committees,[767] in the hope that by joining the election process it can still assume some degree of control over the organisation. Enterprises based trade unions became isolated despite expectations to the contrary because workers regarded them as a tool of centralised management, rather than an organ of democratic participation.[768] Seeing this development, SZOT radically changed its previous standpoint, and started to advocate the principle of trade unions' independence, the restoration of the interest representative function, and the transformation of the democratic trade union movement.[769]

The majority of workers' council were in support of Imre Nagy' government formed on November 1, 1956, and began preparations for transforming production, and for their activities in the factories. Re-elections started in November in an attempt to strengthen the legitimacy of workers' committees. Little information is available concerning the composition of workers' committees, but scattered data suggest that both its chair and its rank-and-file membership came mostly from among skilled workers.[770]

It is partly due to their strong internal support that workers' councils remained powerful enough to maintain control over the factory following the turn of 4 November 1956.

---

[763] SZKL 1-2/88.
[764] Beránné-Kajári (1992:74-75)
[765] Petőfi Circle [Petőfi Kör] was a circle of intellectuals started off in the 1950s. It had a significant role in the preparation of the 1956 revolution.
[766] Ibid.
[767] Broadcast of Kossuth Radio on October 26, 1956; see, A forradalom hangjai at http://www.radio.hu/index.php?option=com_content&task=view&id=374&Itemid=131&mode=1&date=1956.11.01
[768] Beránné-Kajári (1992:76)
[769] The presidency of SZOT dissolved itself on 1 November 1956, and founded the National Association of Free Trade Unions.
[770] Beránné-Kajári (1992:77)

They also elaborated their political program.[771] As a result both the government and the Soviet military command regarded them as a valid negotiation partner. The workers' council of Újpest announced in their call issued on November 12, 1956 that they planned to create a Revolutionary Workers Council of Budapest[772] in order to preserve the achievements of the national revolution.

B The First Legal Regulations

The government attempted to separate workers councils and so called revolutionary councils, and tried to handle them by different legal means. Seeing the commencement of the work of central as well as local units, the government decree of November 6, 1956 acknowledged the newly established grass-root organisations named revolutionary committees [*forradalmi munkástanácsok*]. A new decree issued on November 12, 1956 limited the rights of revolutionary councils to proposal making and required that they eliminate 'counter-revolutionary elements' from their ranks.

Workers' councils, however, were recognised by the government, which strengthened their legitimacy, and they also managed to avoid being merged with trade unions. To counterbalance their power, the government allowed the chairman of the trade union to participate at cabinet meetings. Sándor Gáspár[773] emphasised the independence of the trade unions in a radio speech highlighting the role of the trade union in establishing the workers' councils.

The most important rules of the operation of workers councils were laid down in Legislative Decree No 25 of 1956.[774] The preamble of the statutory provision states that social democracy is only possible under the management of workers councils elected by blue collar workers.[775] This Legislative Decree required the temporary workers councils elected in the first days of the revolution – often by general acclamation – should be replaced by permanent workers councils, but that was only possible if at least two thirds of the workers showed up at their workplaces.[776] This measure was firstly meant to serve as guarantee to legitimate representation, and secondly it was meant to promote resumption of work indispensable for consolidation. In factories where that condition was not met, the regulation kept in office the

[771] These included the scheduling free elections, withdrawal of Soviet troops, and releasing Imre Nagy from prison.
[772] The terms of *revolutionary council* and *workers councils* were used interchangeably, which corroborates the fact that the activity of the two institutions also overlapped.
[773] Gáspár was a politician of the Communist Party, who later became a prominent trade union leader.
[774] Coming into force on 24 November 1956.
[775] In units not directly involved in production, and in cooperatives the option of electing workers councils was not available (Para (2) of Section 1 of legislative decree No 25 of 1956).
[776] Para (1) of Section 2 of legislative decree No 25 of 1956.

temporary workers councils until the conditions were fulfilled pursuant to the provisions applicable to them[777] without granting them the authority ensured in the new legislation.

The workers' council had authority to decide on the most important issues of the company, including insuring continuity of production, payment of wages and benefits, performing of obligations toward the state, maintaining work discipline, setting the company's plans, and staff size, specifying the company's organisational structure, and various in-house organisations, designing corporate wage policy, managing the company's finances, approving the balance sheet, and the employment, and dismissal of leading officials.[778] [779] The workers' council was furthermore entitled to make proposals regarding the enterprise's foreign trade policy. The workers council could transfer these rights to either the chair of the workers council or the company's director on condition that they regularly report back to it, although exercising this latter right would have caused concern in the event of eg, the exemption of the director.[780] Other than that, the workers' council had title to determine the director's tasks, and to make resolutions on issues directly affecting the workers' living and working conditions – following seeking the opinion of the trade union committee – which resolution the director was obliged to implement. In the event of a difference of opinion between the workers council, and the enterprise-level trade union committee concerning the latter issue, the supervisory body concluded the dispute in agreement with the supreme trade union organ.

To sketch the relationship network of the workers council and the company's leading officials, several pieces of legislation has to be interpreted, including Council of Ministers Resolution No 1.077 of 1954 (IX. 21.) on the Rights and obligations of the directors of industrial companies, Government Decree No 7 of 1957 (I. 23.) on the Appointment and dismissal of leading officials of industrial companies, and Council of Ministers Decrees No 123 of 1951 (VI. 17.), and No 125 of 1951 (VI. 17.) on Companies' chief engineers and chief accountants. The workers' council had co-determination right regarding the enterprise-level plan [*részletterv*]. The workers' council was under obligations to create its own proposal on time, submit it for agreement, and to comply with the planning instructions. The workers' council and the director made joint decisions concerning technical development and on modifying the production profile. The appointment or the dismissal of the enterprise's chief engineer and chief accountant also required the workers council's approval.

A fervent debate erupted between the government and the workers' councils in the course of preparing Legislative Decree No 25 of 1956. The workers' councils were of the view that they had to hold the right of approval concerning the appointment and the exemption of the company's director (ie, they claimed that right not only concerning the chief engineer and the chief accountant), and the trade union supported that position. When, however, Legislative Decree No 25 of 1956 was promulgated, they realised that the

[777] Government resolution No 6 of 1956 (IX. 12.)
[778] Para (1) of Section 8, and Para (3) of Section 9 of Legislative Decree No 25 of 1956.

[780] Para (2) of Section 8 of Legislative Decree No 25 of 1956.

government had ignored the workers' councils' opinion, and had created the legislation with its original language.[781]

C Endgame of Workers' Self-governance

The disappointment over the inconclusive negotiations between the government and the workers' councils was further increased by the increasingly intensive struggle with the trade unions for controlling the operation of factories. The trade unions' committees began to organise the re-election of the workers' councils pursuant to applicable legislation, but the workers' councils refused being supervised by the trade unions. The NKM tried to have the Legislative Decree on Workers' Councils amended at the two key points, namely the appointment of the company's director, and the supervision of workers' council election by trade unions. That attempt remained essentially fruitless.

The operation of the NKM came up against even physical obstacles as it was banned from using its former headquarters. The copies of the planned press organ of workers' council, *Munkásújság* [Workers' Newspaper] were seized, and their spreading was disallowed. By the end of November 1956 also the tone of the negotiations changed after György Marosán[782] stated that whoever does not support the government is an alleged counter-revolutionist.[783]

On December 8, 1956 a government decree ordered the dissolution of revolutionary committees, and other social organs of similar names' claiming that those "*revolutionary committees do nothing for the public good, on the contrary, where they exist, and operate, their activity affects detrimentally, and in fact hinders the work of the state and economic organs.*"[784] At the same time, since their creation was acknowledged by a legislative decree, and the dissolution was announced in a government decree, the validity of the latter against the legislative decree is questionable, to say the least.

The NKM protested by publishing a memorandum, but it was obvious that the negotiations could not be continued. The NKM announced new industrial action at the news of the Salgótarján volley. In response, the government dissolved the NKM, the district, county, and city workers' councils, and their leaders were detained by the police.[785] It is an interesting phenomenon at the same time that the government's actions concerned exclusively the top organisations of the workers councils, while enterprise level units received support along with trade unions.

---

[781] The workers councils announced a strike in protest, to force the government to satisfy their claims. They did not resume work even after their action proved to be inconclusive (except for Csepel).
[782] György Marosán was a prominent party member of MDP-MSZMP. He was a fierce opponent of the revolution of 1956. His infamous speech of December 8, 1956 in Salgótarján he proclaimed that military force was to be used to halt the revolution.
[783] Beránné-Kajári (1992:89).
[784] Government Resolution No 17 of 1956 (XII. 8.).
[785] In January 1957 death penalty was extended also to workers on strike.

The trade union assured the government of its support, and called for the punishment of those contravening the interest of the people.[786] Almost like in compensation, the government helped the reinforcement of the trade unions' positions by strengthening state control,[787] restoring the earlier competence of personnel affairs departments, and increasing the powers of party organisations in the factories. That was supplemented by the instrument of political condemnation, whereby Government Decree No 10056 of 1956 (coded 'confidential')[788] required that the dismissals must be used to strengthening the professional and political organs. The 'cleansing' operations came together with action by the armed forces. They did their best to discredit those dismissed, and branded them as counter-revolutionists. These measures clearly disintegrated the factory collective, and increased the workers' reluctance to openly support the workers councils.

The option of decentralisation, however, did not close immediately, factory workers councils did not terminate until November 1957, and the issue of worker' self-management remained on the agenda for some time. The government issued a statement in which it announced that it would, following the trade union's advice, organise a committee charged with preparing the democratisation of production. Representatives of the trade union committee, and the workers councils in the factories, and members of the NKM loyal to the government sat on the committee.[789]

At the same time, the government, quoting economic difficulties, returned to the previous methods of central administration, and arrests meanwhile also began to target the members of the factory workers councils. Hungarian Socialist Workers' Party [*Magyar Szocialista Munkáspárt*, MSZMP][790] regulated the party policy regarding workers councils, which, naturally, equalled the implementation of the party's leading role.

No support came from the trade union's side either. Although Sándor Gáspár, in his speech firmly stated that the trade union consistently sided with the workers' councils, and was in favour of ensuring that workers gain control over production processes, but was not more specific than that. The trade union, however, gave up the principle of independence, and the right to strike, and supported bringing back work contests and also vindicated workers councils' rights.[791]

Proposals concerning the development of workplace democracy and the creation of a new legislation concerning trade unionism were on the agenda of the political committee of MSZMP in August 1957.[792] As to the first issue, it decided on the termination of workers' councils and the establishment of works councils [*üzemi tanács*]. The second issue was not discussed in detail, according to the documents it was briefly decided that instruments to

---

[786] Beránné-Kajári (1992:91).
[787] In numerous companies the director formerly exempted by the workers councils was re-instated.
[788] Pieces of legislation coded 'confidential' were binding but not promulgated. Beránné-Kajári (1992:92)
[789] Beránné-Kajári (1992:94)
[790] The Hungarian Socialist Workers' Party (Magyar Szocialista Munkáspárt, MSzMP) was organised from elements of the Hungarian Working People's Party during the Hungarian Revolution of 1956, with János Kádár as general secretary. MSZMP was the ruling party of Hungary between 1956 and 1989.
[791] SZKL 1-2./94 and Beránné-Kajári (1992:97)
[792] The author of the former was the committee elected by the political committee of the MSZMP whose membership was Antal Apró, Jenő Fock and Sándor Gáspár (SZKL 1-4/396), the latter was made by the trade union.

ensure effective control of workers should be created.[793] The official ideology claimed that in a socialist state there is no justified need for the independent protection of workers' interests. In connection with that statement was the state's ownership, and its role as a unifier of social interest, and the financial management in a plan economy framework.[794] That, at the same time, also foreshadowed that trade union committees could not take over the rights of the workers' councils.

The political committee's [*politkai bizottság,* PB] resolution required that the trade union should take charge of elaborating the rules for the works councils. Pursuant to the guidelines of the resolution, the milestones of the regulation were the control of the financial management of production companies, implementing the plan economy, strengthening the societal ownership of state companies, and carrying on with the principle of one-man leadership. The document contained provisions to grant the right of consultation and the right of control to works councils, but the final wording whereby "*the director is obliged to implement the works council's decisions within its sphere of authority, and the works councils controls the implementation of the resolution*" has rendered the scopes of authority intransparent.[795] Workers' councils were usually established first in factories using advanced technology, and where the most qualified groups of skilled workers were employed. Workers' councils were characteristically democratically elected grass-root organisations with a clearly stated economic program. Leaders of workers' councils regarded the production equipment as belonging to the given enterprise collective, and made a clear declaration that they had no intention to return the equipment to their pre-war owners (that is another proof that invalidates the later accusation whereby workers councils wished to have the previous system restored). Although the original purpose workers' councils were the creation and operation of self-regulation, and control by workers, they also formulated a political program as their plans could only be executed in a democratic political framework.[796]

III Participation after the Revolution

Government Resolution No 1086 of 1957 (XI. 17.) on Works Councils was the outcome of the preparatory work by the trade unions.[797] Legislative Decree No 63 of 1957 on the Termination of Workers Councils was announced, and Government Resolution No 1068 of 1957. (VIII. 4.) on Production Councils was passed during the same wave of legislation.

[793] PIL 288. f.5 /41
[794] Beránné-Kajári (1992:99)
[795] SZKL 1-3/333.
[796] 9-10 Magyar Füzetek (Paris, 1981), 85-102
[797] Probably there was a formal error in the promulgation, as it was a joined legal measure of the Government and the Trade Union Council, thus it should have been a decree and not a government resolution.

A Works Councils

The preamble of Government Resolution No 1086 of 1957 begins with a definition to workplace democracy. It says that the broadening of workplace democracy, and the increased involvement of workers – primarily the working class, and intellectuals involved in production – in directing the efforts of building the economy serves the purpose of promoting the enfolding of workers' creative initiative in building the socialist system, speed up building of socialist economy, and contribute to the further development of social welfare, and, as a result of the above, further strengthen 'people's democracy'.[798] The decree made clear the limits of these aims by regarding the works councils as organisations operating under the trade union, which is mentioned three times in the document for perfect clarity.

A further barrier to their operation was that the lawmaker tried to make works councils fit to the traditional framework of the management of state-owned companies. Theoretically it was the works councils' duty to involve through their activity the workers of the factory in the financial management of companies, in the control of production, in promoting the realisation of the plan economy, and the consolidation of the workers' ownership of state companies. At the same time it was also expressed immediately that the shaping and operation of works councils must not affect the company director's sole responsibility. Works councils had different authority in economic issues on the one hand, and social-cultural issues on the other. In the spirit of the foregoing the director's sole authority of decision making prevailed fully in economic issues, and the works council only had consultation rights. Their control prevailed in social-cultural issues through co-determination.

However, the right of consultation and co-determination only existed nominally, and was practically limited to complying with the economic plans. Works councils were entitled to control the profitability of the enterprise, production equipment, raw materials and financial assets, the implementation of technical development, the quality control, and also whether human resources were being used according to the economic plan. Works councils were also in charge to observe disciplinary issues, and whether measures brought to protect social property were being complied with. The system of the plan economy narrowed their right of consultation to an even smaller area: the opinion of the works councils had to be sought in questions of the company's draft plan made on the basis of the ministry's instructions, specification of the investment projects financed from the enterprise's own assets, and from loans, use of financial assets earmarked for renovation, the organisational structure of the company, determining the main forms of remuneration, staff number, the execution of major innovations, and the realisation of inventions.

In the socio-cultural area works councils were entitled to co-determination right on distribution of the enterprise's profit share, bonuses, use of amounts earmarked for social

[798] People's democracy' was sometimes also referred to as the 'dictatorship of the proletariat'; for a detailed analysis see, R J Crampton *'Eastern Europe in the twentieth century and after'* (1997, Routledge), 227 ff.

investments, and allocation of smock. That was all a very narrow area for enfolding workers' creative initiatives.

Andor Weltner saw the obligations of the works councils as being a two-way process. He maintained the position that works councils owe an obligation toward the enterprise: they help the director in managing the company, achieving a profitable operation, and complying with the law. On the other hand they had to report regularly to the workers' collective concerning their activity.

The enterprise's director, too, had obligations vis-à-vis works councils, but that was formulated in a controversial manner. It was repeatedly stated that works councils' operation should not limit the director's sole managerial rights, but the director at the same time obliged to execute the works councils' decisions. On top of all, the director was obliged to promote works councils' operation, had to seek their opinions prior to decision making, and ought to facilitate their control by reporting on his activity if so required.

It was the personal obligation of the member of works councils' to exercise their statutory rights and perform their statutory obligations, and do their work in accordance with their qualifications (general obligation), and treat confidentially all information brought to their attention (special obligation).

Government Resolution No 1086 of 1957 set works councils in the service of the plan economy, and used controversial phrasing concerning the relationship of the works councils and the enterprise's director thereby leaving a rather limited space of manoeuvre available for the institution. A further limitation came from the fact that the resolution ordered to settle issues not regulated in the resolution along the principles of 'democratic centralism', and 'mutual socialist cooperation'. But the principle of democratic centralism required that the company's well-founded, that is legitimate interests had to be ranked above those of the workers, and social interest as provided by legislation superseded that of the enterprise, or even the workers. That principle was followed also within the trade union through the fact that the lower ranking trade union organ was obliged to execute the resolutions of the higher ranking organ.[799]

There was no point for subscribers to the central ideology to advocate that common social interest would eventually enable the creation of common corporate and individual interest, and that there is no need for instruments of public law to guarantee work peace because "*cooperation of comrades, and mutual socialist assistance are an objective necessity even if occasionally the opposite happens*", therefore, in a socialist establishment the work collective is held together by a harmony of objectively implemented and implementable interests.[800] In reality, the 'harmony of interests' was usually achieved to the detriment of workers.

As in the system of the plan economy there was still no need (or possibility) for real worker participation, the state apparatus was forced to invent empty slogans such as the hard-to-understand explanation whereby in the socialist conglomerates "*the workers' participation gradually increases through the power of the objective necessity of creating harmony of*

[799] Weltner (1961:478)
[800] Weltner (1961:72)

interests."[801] Given the fact that the living and working conditions of workers showed no apparent improvement, the effort of works councils were hardly noticeable to workers. Moreover, the role of the works councils operating on shop floor level, and under the auspices of the trade union, workers could hardly differentiate between the trade union and works councils. The distinction was made even more difficult by the rules applicable to the election and composition of the works councils.

The 'socialist surplus' of employee participation came from the composition of works councils: representatives of the party, the trade union, the Communist Youth Alliance [*Kommunista Ifjúsági Szövetség*, KISZ] were present among its members together with the enterprise management, thereby further 'improving' harmony of interests.[802] The works council election regulations in fact respond to that principle.

The trade union committee took care of the establishment of works councils, its membership ranged from 15 to 121, and the specific number within that broad range was always determined by the trade union committee. Its composition was subject to the requirement that 'there should be a sufficient number of trade union officers to guarantee the cooperation of the trade union and the works council work, and that to also ensure that the 'key figures of the communist system should participate', ie, 'people with the appropriate sense of political identity'.[803]

Alongside these principles, two thirds of the members of the works councils were delegated by the trade union, and one third of the vote was available to the workers themselves.[804] The enterprise's director, the chief engineer (or chief agronomist), and the chief accountant of the enterprise as well as a secretaries of MSZMP and KISZ were *ex lege* members of the works councils. But the law further curbed the workers' right to intervene by politically 'censoring. Only those workers were eligible (having spent at least two years working for the company) who were loyal 'to the working people, and to the Constitution of the People's Republic'.[805]

This, on the one hand, further increased the party's control, and, on the other, it was sufficiently murky to ensure large enough grounds for political screening as the law provided no specific reason to recall a party functionary, while incompatibility had to be stated concerning all political, economic, and other activities, and behaviours that were against the interests of the working people. Therefore, even if a 'flaw' had occurred, and an unwanted person had become member of the works council, the committee would not have taken long to find out a well-founded reason to eliminate him/her. Even the rule that two-thirds majority was required for recalling a member of the works council had no significance at all, as that majority was guaranteed in the first place by the *ex lege* members. That composition of the works councils as described above could halt any unwanted action of the 'real' elected

---

[801] Ibid. Although the works of Andor Weltner, especially those written in the 1950s are viewed against an excessively political backdrop, and the author was palpably driven by a compulsion to conform to the contemporary ideology, the critical approach still exchanges a complicit glance with the reader] still surfaces at certain points. Thus when Weltner analyses the preamble of government resolution 1086 of 1957, he finds it excessive to label Hungary the 'state of proletariat's dictatorship', and he believes it still happened because the legislator translated the Soviet legislation used for reference verbatim.

[802] Weltner (1961: 573)

[803] Weltner (1961:578-673)

[804] Government resolution 1086 of 1957 IV. Section 13. a)

[805] Government resolution 1086 of 1957. IV. Section 14.

members of the works council, because all decisions required a majority of the vote, and, as described above, the elected members made up only a third of the works council. Even the operating rules of the works council did not involve a risk of error with its quarterly sessions as it was fully subordinated to the trade union, moreover, it was the trade union that acted with the works council's authority between two sessions.

It is likewise interesting to look at what happened if the director ever infringed the rights of the works council's rights. In that case, as he was solely accountable, his action was effective; however his action was subject to disciplinary measures. Short of mandate, however, the works council could not take action against the director, and could not implement the disciplinary measure itself. All it could do was to condemn the director (who was, in fact, its own member). The trade union was entitled to take action by turning to the establishment's supervisory organ seeking it to instruct the director to observe his obligation, and, if the director was a party member, then even the party could take an action. These, however, could hardly work as genuine instruments of enforcing one's rights if only because of their overly political character.

B Production Councils

The other institution of worker participation was the production council, created by Government Decree No 1068 of 1957. Its purpose was to involve workers in the enterprise's production activity and quality control. The limitations applicable to works councils are clearly visible here, too: workers' right to participate was not supposed to entail any restriction on central administration, or on the principle of sole responsibility ensuring its enforcement. Even that area was not short of political ideology: it was argued that control by the collective, and the one-man leadership by the director complemented each other in paving the way to the success of the state socialist style of economy. Through the operation of production councils it was hoped that the directors' professional standards, and the workers' political standards would rise, and the pace of that development determined the extent to which the collective of workers can participate in management. At the same time, the participation was severely limited by the principle of state socialist company management. Therefore, production councils only empowered with the right of consultation and the right to make a proposal.[806]

The preamble of the Government Decree stated that its aim was to involve workers, and to increase production, which instrumentally necessitates familiarity by the workers with production processes. However, the statement fell short on real competencies delegated to production councils: the function of production councils was to present the quarterly plans.

[806] Weltner (1961:673)

IV Workers' Participation Following the Economic Reforms

The second part of the 1960s brought significant changes to the economic sphere. A new labour code, Act II of 1967 was adopted, introducing important changes concerning participation. The 9th Congress of Hungarian Socialist Workers' Party [*Magyar Szocialista Munkáspárt*, MSZMP] held between November 28 and December 3 in 1966 decided to launch the economic reform program. The Party's leading role in the economic reforms remained unquestioned, as János Kádár, the General Secretary of MSZMP put it "[as] the Party is leading the society, it is natural that in every aspect of civil life communist have a leading role. This is the glorious mission, pride, and at the same time, burden of communists."[807] His thoughts were reinforced by Leonid Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union (CPSU): "[e]stablishment of new social patterns, cultural development and the shaping of socialist mind-set are only possible through the leadership of the Communist Party. Socialism and the Party, such as the Party and the people are inseparable from each other. This is one of the most important conditions of safeguarding the power of socialism."[808]

In his New Year welcome note, Károly Németh, member of the Political Committee of MSZMP wrote in connection with the unity of the socialist society that the completion of the socialist order is a shared task, and those, who are not identifying themselves with the Party's program would be excluded from the achievements of the society.[809] However, as Németh further specified the request, to blend in it was enough not to actively oppose the values of established system. Thus, it was far from the Rákosi regime's 'he who is not with us is against us' policy. As Kádár argued, people should be judged by their contribution to the socialist society, and only those would be punished who tried to actively dismantle the system. That was the era of passivity, the policy 'he who is not against us is with us.'[810]

However, the economic reforms had a strong political framework. It was not advised to compare the reforms to those of the 1953-55 marked by the Imre Nagy's chairmanship or to refer to them as an alternative of the planned economy. Also, it was also questioned whether the reforms could be called as 'reforms', Kádár and other prominent party members repeatedly stressed that the changes were not more than tools which made the already existing political and economic system work better.[811] General information pamphlets distributed at workplaces only dealt with practical details regarding planning, export and import regulations. Challengers of the reforms hardy spoke in public; probably the only openly criticised aspect

---

[807] *A Magyar Szocialista Munkáspárt IX. kongresszusának jegyzőkönyve* [Minutes of the 9th Congress of Hungarian Socialist Workers' Party] (Budapest, 1967, Kossuth Kiadó), 422.
[808] *A Magyar Szocialista Munkáspárt IX. kongresszusának jegyzőkönyve* [Minutes of the 9th Congress of Hungarian Socialist Workers' Party] (Budapest, 1967, Kossuth Kiadó), 148.
[809] Népszabadság, January 1, 1967.
[810] J Kádár *'Hazafiság és internacionalizmus'* [Patriotism and Internationalism] (Budapest, 1968, Kossuth Kiadó) 442–43.
[811] Kádár addressed the economic reforms first in public in his speech at the Trade Union Congress of May 1967, declaring that they are only moderate changes in the economic leadership and socialist valued were to be preserved. See more on the political embeddedness of the reforms in, J Kádár *'Hazafiság és internacionalizmus'* [Patriotism and Internationalism] (Budapest, 1968, Kossuth Kiadó) 327, 399-400.

of the reform program was its profit sharing scheme, declaring that an enterprise's profit should be shared among directors, middle managers and workers in a ratio of 80:50:15.[812] Opponents were turned down by the official reasoning: "socialist distribution principles do not comply with bourgeois equalitarianism." [813] It is noteworthy that the first provision in 1969 was the repeal of the profit distribution scheme, one of the flagship institutions of the economic reforms. Workers felt so swindled and betrayed that many of them refused to take up the profit. Thus, 1969 onwards enterprises were ordered to calculate profit share as an element of the basic wage.[814]

Soon it became apparent that the economic reforms were not sustainable without political changes. The economic independence of enterprises would have required directors to be appointed based on objective criteria regarding leadership and management skill and workers should have had a word in the selection process. The envisaged economic reorganization called for political pluralism, similar to the concept which had been initiated by Imre Nagy and to what was demanded during the 1956 revolution. However, it would have been difficult for the Party leaders to maintain the legitimacy of the measures after the 'anti-Soviet' revolution. After 1968 the intellectuals' opposition revived[815] and by 1972 different ideological streams popped up even within the Party. To maintain the 'soft dictatorship', there was no other possibility than to bring the whole economic reform program to an end.

A Official Framework of Participation

The new Labour Code of 1967 set forth that the purpose of the Act is to regulate how workers could contribute to, in accordance with the provisions of the Constitution (Act No XX of 1949) and through channels of the trade union, the regulation of work and living conditions and how they could facilitate the improvement of the productivity of an enterprise and control its activity. The basic concept of the Labour Code was to enhance indirect participation through trade unions and leave a narrow space for direct involvement. However, the overall leeway of the Labour Code was not so significant. Trade unions were seemingly given an important role, but the structure and nature of participation was rather limited in reality due to the all-encompassing presence of the Party.

Indirect participation was envisaged through trade unions in three levels. On a national level SZOT had various consultation rights in the legislative process regarding the living and working conditions of workers. SZOT had the right to initiate new regulations, it had the right

---

[812] I Pető, '*Beszélő évek – 1967*'(1998) Beszélő, available online at http://beszelo.c3.hu/cikkek/1967.
[813] Népszabadság, October 11, 1967
[814] Workers were notified on their pay slips in which category they were filed, Category I stood for directors, Category II for mid-managers and Category III for rank-and-files; see, M Haraszti '*Beszélő évek – 1969*' (1998) Beszélő, available online at http://beszelo.c3.hu/cikkek/1969.
[815] Most notably, an academic dispute was initiated on the different interpretations of Marx's philosophy, questioning the legitimacy of ideological leadership of MSZMP (see for example the essays of M Ludassy or Zs Ferge, *Magyar Filozófiai Szemle* 1973. 1–2). These articles were heavily attacked chiefly by the Cultural Committee of MSZMP (see, *MSZMP határozatai és dokumentumai 1971–75.* (Budapest, 1978, Kossuth Kiadó) and many of the philosophers and social scientists eventually were dismissed after 1973.

to form an opinion on the activity of the Council of Ministers; however, the opinion of SZOT was not binding. It also had the right to agree, meaning that ministers issued regulations on their own, however, concerning the operation of an enterprise, regulations of matters which influenced workers' living and working conditions were void in case the relevant trade union did not approve it beforehand. Finally, SZOT had the right to co-regulation, which was different from the above mentioned right of agreement, as in that case an administrative organ or an enterprise issued a regulation together with SZOT.[816] On industry level industrial-level trade unions, while on enterprise level the various basic units of trade unions (eg, trade union foremen, trade union group, workshop unit, etc) were empowered with participatory rights.

Regarding direct participation, the core legal measure of this era was Decree No 1001 of 1965 on the democratization of production committees.[817] It provided for that production committees were entitled to inquire information on production plans and goals and to articulate their opinion on the *execution* of these plans. Production committees could decide which work competition method they prefer to use and had decision making right concerning the 'Outstanding Worker' and 'Socialist Brigade' awards. While forums of indirect participation were entirely brought under the umbrella of trade union movement (after 1967 there were no more works council elections), the Party's influence on direct participation was increased.[818] These measures indeed did not bring workers closer to the idea of workplace democracy. The major 'breakthrough' was brought in 1977 by Act No VI of 1977 on State Enterprises and Decree No 1018 of 1977 on Workplace Democracy – ironically, after the new economic mechanism was officially abolished in 1973.

B Changes in the Structure of State Enterprises

Socialist state enterprises went under significant changes after 1968 regarding both their external and internal relations, and some of them survived the cessation of the economic reforms. The direct compulsory nature of the national economic plan was eased and factory management was provided with more independence regarding financial and production issues. These external changes influenced the enterprises' internal relations as well. A manifest legal instrument of the new spirit was Act No VI of 1977 on State Enterprises. The new law adjusted the internal and external relations of the enterprises according to the new requirements and provided substantially greater freedom to management with regard to the allocation of the net income of the enterprise. Due to the new regulations, directors were believed to have more interest in effective production management of the enterprise. The

[816] An example for the right of co-regulation could be a collective agreement (see, I Hagelmayer 'A collective szerződés alapkérdései' [Fundamentals of Collective Agreements] (Budapest, 1979, Akadémiai Kiadó) 131-38). For a detailed description of the rights and duties of trade unions see, A Weltner *'A magyar munkajog'* (Hungarian Labour Law) (Budapest, 1978, Akadémiai Kiadó), 61ff.

[817] 1001/1965 (I. 16.) MT-SZOT közös határozat [Joint Decree No 1001 of 1965 (I. 16) of Council of Ministers and SZOT].

[818] MSZMP Political Committee's Decision on the independence of trade union activity of May 10, 1966; see, MSZMP határozatok és dokumentumok 1963-1966 [Documents and Decisions of MSZMP 1963-1966] (Budapest, 1968, Kossuth Kiadó), 288.

workers of the enterprise hence were also supposed to become more prominent 'part-owners' of social property. This increased interest of workers was transposed to reformed participatory regulations.

Act No VI of 1977 stipulated that directors of the enterprise relied on the workers' collective while executing his/her duties. That was a response to the formerly way overstressed role of directors in the state socialist economic model, which was based on the 'one-man responsible direction'. Also, by formally referring to workers' participation, a first step was made to separate the rights and competencies of trade unions and participatory instruments.[819] Directors and their deputies, within their capacities, had to cooperate with the enterprise-level trade union and KISZ organizations, and they had to cater for workplace democracy.[820] Regarding decisions that concern the majority of the workforce, directors were obliged to involve workers in the preparatory and controlling procedures. To facilitate workers' participation, decision making and internal audit processes, as well as incentive policies had to be streamlined.[821] Workers were allowed to express their opinions and to participate in the evaluation, and to some extent, to opine about the director as well, in accordance with the regulations set forth by legal measures or the code of conduct of enterprises.[822] Specific collectives of workers were provided with co-determination rights as well; however, the scope of that right was not defined by Act No VI of 1977, but was referred to other legal instruments.[823]

C Direct and Indirect Forms of Participation

However, the regulatory framework of workplace democracy seemed to be quite flexible and tailor-made to potentially serve the different needs of enterprises, the punch line was provided for by Section 21. It set forth that the different forums of workplace democracy, the establishment and operation of these forums, their competences and the way of participation was provided by legal regulations in accordance with the principles set forth by the Council of Ministers of the Hungarian People's Republic and the National Council of SZOT and, in some cases, the Central Committee of KISZ. Thus, centralization eventually overshadowed the enterprises' self-government regarding participation. The regulatory scope of code of conducts was further curtailed by the obligation of directors to consult and seek agreement with the enterprise level trade union unit and KISZ, organizations which were not at all independents from party politics.

---

[819] Cs Lehoczky Kollonay *'Some Aspects of the Internal Management and Labour Relations of Socialist State Enterprise'* (1982), 10 International Business Lawyer 14.
[820] Section 19 of Act No VI of 1977.
[821] Section 20 of Act No VI of 1977.
[822] Evaluation of the directors' work was made on an annual basis. Section 20 Paras 3-4 of Act No VI of 1977.
[823] Section 20 Para 2 of Act No VI of 1977.

An amendment to the Labour Code inserted a new part to the Code on participation.[824] It first repeated Section 19 of Act No VI of 1977 and added with special emphasis that directors' individual responsibility should remain regarding decisions subject to participation. Then it further elaborated on the specific rights of workers' collective to submit proposals and observations on any significant issue related to the enterprise management or the interest of the collective. The workers' collective was empowered with the right to offer an opinion or, in some (unspecified) cases to make a decision and to control its implementation. I am in fact indecisive whether the emphasized individual responsibility of a director facilitated participation, or, to the contrary, was proved to be an obstacle to it.

Further to the point on the separation of competencies of trade unions and those of workers' participatory instruments, the Labour Code stipulated that workers could exercise their participatory rights directly and indirectly. While participation through trade unions remained important, new aspects were considered while reforming workers' involvement in decision making, and that was the workers' collective right as owners of the social property.[825] The separation of competencies was most realistic on a shop-floor level by forms of direct participation.

However, not free from controversy, the power to organize direct participation was vested in trade unions. According to Joint Resolution No 1018 of May 7, 1977 by the Council of Trade Unions, the regulations regarding the establishment of enterprise forums, the rules of their operation, the method of workers' participation and the subject matters of issues submitted to the enterprise forums had to be stipulated in an enterprise agreement, which was drawn up jointly by the trade unions and the enterprises' management, within the framework of related legal regulations.[826] Once again, the terrain of workers' own initiatives to exercise their participatory rights was narrowed down. Moreover, it would be hard to imagine that forums like this had genuine influential power over decision making in any substantial matter.

Direct workplace democracy was governed by Council of Ministers' Decree No 1021 of 1973 (VI.27). The basic forums of workers' participation were those of organized at small units, like brigades, workshops and departments. Special meetings could be arranged over topics related to women, youth, shop foremen, innovators or similar issues. The meeting of socialist brigade leaders was an intermediate forum between direct and indirect forms of participation. Such a meeting had to be convened at least once a year. Participation at any higher level than shop floor was indirect, effectuated through trade union organizations. These forums were the meetings of trade union councils and trade union officers.[827]

---

[824] Section 10/A of Act No II of 1967, amended by Legislative Decree (sic!) No 3 of 1978, effective of February 1, 1978.

[825] Cs Lehoczky-Kollonay, *'Some Aspects of the Internal Management and Labour Relations of Socialist State Enterprise*' (1982), 10 International Business Lawyer 15.

[826] Andor Weltner argued however, that participation is one of the many rights of trade unions. A Weltner, 'A magyar munkajog' (Budapest, 1978, Akadémiai Kiadó), 60.

[827] A Weltner, 'A magyar munkajog' (Budapest, 1978, Akadémiai Kiadó), 52 and 75-84.

D Empirical Experiences of Participation

As workers are not exclusively 'economic beings', it was particularly important that, in addition to achieving financial safety, their work should make sense. With the decline of professional improvement non-financial incentives including worker participation gained significance.[828] An empirical research completed by Lajos Héthy[829] and Csaba Makó found that a significant percentage of workers thought that their participation in the socialist workers movement was merely part of their tactic to achieve higher wages, and all they wanted was to ensure 'ideological coverage' for themselves. The inappropriate working of workplace democracy hindered the workers' ability to identify with the company's mission. The above also suggests that the production council would have been the key institution of democracy at factories. Their task was to 'involve workers directly in managing the enterprise, and in finding the most practical, and most economical solution'. In theory, production councils granted workers the right to have their say in technical and organisational issues, and empowered them to shape the policy regarding financial and in-kind incentives.

Practice reflected an altogether different picture. Interviews with workers suggest that production committee was a remarkably formal institution. "*They present the details of achieving the plan of the previous quarter, any lags, absences for fraction days, and accidents. They say we should do a better job otherwise we cannot compete with the West. Then they open the floor for contributions: people say they lack appropriate [tools]. They answer simple questions on the spot, and difficult ones (...) in writing. Then months pass without anything happening.*"[830]

Other than discussing "primitive organisational problems", and presenting the results of the work contest, issues really interesting for the workers, problems that actually affected their existence rarely or never came on the agenda of production councils. A large proportion of factory workers found it quite pointless having a hasty production council every quarter between two shifts; what the overwhelming majority did need was direct or indirect input in decisions that concerned them.

The other cornerstone of workplace democracy was the brigade movement. The aim of the movement was 'to mobilise, and utilise the company's internal reserves through the activity of the people thereby increasing the efficiency of socialist economic management.' It attempted to develop socialist communities that could 'participate proactively, and responsibly in the company's decision making, and the realisation of workplace democracy' with the required information, knowledge, and experience.[831] At the same time the socialist brigade movement, similarly to the operation of other institutions of workplace democracy

[828] Héthy-Makó 1972:73
[829] L Héthy and Cs Makó '*Munkásmagatartások és a gazdasági szervezet'* (Budapest, 1972 Akadémiai Kiadó)
[830] Héthy-Makó 1972:41
[831] Héthy-Makó 1972:78

drowned in its own formality, and/or became the cover institution of implementing individual interests."[832]

Workers could not have a say in the decision making process by means of the formal pathways created for them. Thus participation in reality was transferred to informal channels. A survey involving smoothening locksmiths in 1968 allows for the conclusion that employees, feeling unable to have an appropriate production policy, and thereby appropriate wages granted to them by company management at the production councils, and/or the brigade movement, resorted to the instrument of slow-down strikes to force the decision makers to change their original plans. That collective action assumed that workers had a wide-ranging internal information channel, and harmonised, unified, and effective self-management.[833]

V Participation and Politics in the 1980s

The economic reform process launched in 1968 slowed down soon, so, although it brought a major turn compared to the Stalinist era, it remained – understandably – unable to show up resounding achievements. Economic reforms were given an impetus through the fact that COMECON countries opened their economies before the goods and credit offered by Western countries. Although indirectly, this had its implications also on smaller or greater human rights initiatives.[834] Changes began to unfold in all areas of economic and political life even if they did not follow a straight course. That development halted suddenly in the early 1980s.[835] Official explanations blamed the slow-down of economic growth on the huge dollar indebtedness of the 1970s. That of course was a justified claim as debt service reached a dimension where exports could no longer cover the repayment instalments at the same time as imports required for continuous growth. Meanwhile credit became also increasingly difficult to come by, which naturally resulted in a slower pace of growth. A further contributing factor was that the financial credit offered by Western countries at the end of the 1970s enabled the postponement of the restructuring of the foreign trade. Economic difficulties were compounded by the fact that the cheap raw material reserves of the region's most important trading partner, the Soviet Union were dwindling, which compelled the East-Central European countries to purchase some of their resources for USD instead of Rubel.

East-European, and thus also Hungarian leaders had two scenarios for remedying the problem: cutting consumer spending and rekindling the economic reform process halted in the

[832] The third large group of incentives, the work contests also fell prey to formalism. A sign of that fact was that in assessing brigades' performance in the contest, the almost exclusive factor was the outside appearance of the brigade diary, and how regularly it was updated.
[833] Héthy-Makó 1972:107
[834] For example Hungary ratified ICCPR and ICESCR in 1976 (see, Decree of Legislative power No 8 and 9 if 1976).
[835] That was not only a problem for Hungary, but also for other countries of the CEE region, most notable Romania and Czechoslovakia suffered from the lack of consumer goods.

early 1970s. The former met with perceivable disapproval by the population, while the second was held back by the machinery of economic administration. In the Soviet-type economic administration the party functionaries as well as general directors of enterprises had good reason to fear that a comprehensive economic reform would undermine their own importance, and that the unwanted competition of a market economy would jeopardise their comfortable positions. In the reformed system prices, wages, and employment would have moved more freely, which, again, would have weakened the power of the apparatus. Two options were open before the top of the political élite in the early 1980s: building a mass base against the apparatus by satisfying consumer needs, or join forces with the apparatus, and demonstrate its power vis-à-vis the society by taking back political concessions. The 1982 events in Poland decided the dilemma in favour of the latter for all Eastern Europe.[836]

Despite its serious indebtedness, Hungary was still best positioned in the region. Prices were rising, but through the concessions granted to it, the population could resort to the second economy, and managed, for some more time, maintain (and in some cases even increase) its income. In return, it looked at state administration as the best available in the region, whereby Hungary managed to avoid open conflict similar to that in Poland or Romania.[837]

To ensure recovery, and keep as much of its public support as it could, the government tried to re-adjust the management system of companies in an attempt to proceed with the reforms that were first undertaken, and then suddenly halted. The ministries of heavy and light industry were merged, numerous trusts were broken down, and legislation was created to enable various forms of small enterprise. Yet, the country's advantage over the other countries of the region rapidly melted. Masses of people could not capitalise on the second economy, which resulted in a growing number of those living at or under the poverty line. That process, on the one hand, clearly pointed at the necessity of social policy reforms, and, on the other, it put the complete failure of the trade union's interest representation function in the limelight.

The 11th Congress of MSZMP concluded that the standing of workplace democracy was not satisfactory.[838] However the conclusion was accurate, the Congress, leveraging on the findings of the Party's College of Political Sciences,[839] decided the root cause of this failure was that the Party's political influence had not been enough. Again, the Party's all-encompassing nature was emphasised; it was argued that the Party, considering the interest of the working class and the entirety of the society, has to formulate the economic and social goals and must lead the society in unity to achieve these goals, without which socialist development has not been possible. Participation was envisaged as a tool to serve this unity by meeting production goals, overcoming technical challenges and strengthening diligence at workplaces.[840] It was decided that the impetus on democracy had to be given in line with the

[836] On December 13, 1982 the Polish government brutally turned down the Solidarity movement.
[837] Kis János 1982:120 (Beszélő 3.)
[838] *A Magyar Szocialista Munkáspárt XI. kongresszusának jegyzőkönyve* [Minutes of the 11th Congress of Hungarian Socialist Workers' Party] (Budapest, 1975, Kossuth Kiadó), 486.
[839] MSZMP Politikai Főiskola
[840] L Héthy 'Az üzemi demokrácia és a munkások' [Workplace democracy and workers] (Budapest, 1980, Kossuth Kiadó), 218.

principles of democratic centralism.[841] [842]As the Party had effective control over all aspects of the society, it was understood that its influence on fostering workplace democracy would also be prevailing – as it was described in the Party's decrees.[843]

The remedy offered by the Party clearly could not help the democratisation of the works councils. However, there was an increasing social need to restore participatory institutions and together with the slow destruction of state socialism, it became topical once again to search for genuine forms of participation.

In his essay on the reform of labour law and workplace interest representation Ferenc Kőszeg [844] assumed that law had only a secondary role in regulating conditions at the workplace. One reason was that technical, organisational, social, and psychic systems attributed a role at least similar to law to other regulatory forces. Kőszeg identified as the other reason the informal rules driven by political interests, making special reference to the relations between the company managers and official party functionaries. Although no legislative standard other than the general thesis of the Party's supremacy affected or determined the party organisation's competence at the workplace, in actual fact the party organisation had massive clout in personnel issues. Kőszeg attributes that – ever weakening – power to the fact that labour law standards failed to clarify the question of authority at the workplace. The clearer the applicable statutory provisions and other rules had been the larger space there would have been for the organised action by employees either in the area of interest representation or influencing decision making.

The double role imposed on the trade unions (execute the party's instructions through their function as a transmission belt, and represent workers' interests) resulted in failure to perform either, which gave central leadership the convenient position of being able to keep trade unions under control through compulsory party resolutions. Thus, trade unions could have played a workplace interest representation function only if they could gain independence from the party.

Employees were depressed because of their inability to influence employers' decisions, and because their employer's decisions[845] affected also their private lives. That called for reforms empowering employees to have a say in issues concerning their workplace, because employees like to be regarded as members of a community with a meaningful mission. And that has two elements mutually assuming each other's presence: a democratising economy, and employees with a strengthening sense of identity. Some of these problems were resolved by the Labour Code of 1992.

---

[841] During the leadership of Leonid Brezhnev the original (Leninist) idea of democratic centralism was chiefly modified, in the 1977 Soviet Constitution, it appears as a principle for organizing the state: "The Soviet state is organized and functions on the principle of democratic centralism, namely the electiveness of all bodies of state authority from the lowest to the highest, their accountability to the people, and the obligation of lower bodies to observe the decisions of higher ones."

[842] *A Magyar Szocialista Munkáspárt XI. kongresszusának jegyzőkönyve* [Minutes of the 11th Congress of Hungarian Socialist Workers' Party] (Budapest, 1975, Kossuth Kiadó), 467, 500.

[843] Az üzemi demokrácia néhány elvi kérdése. Az MSZMP határozatai és dokumentumai 1967-1970 [On some of the theoretical issues of workplace democracy. Decrees and documents of MSZMP, 1967-1970], 384.

[844] Beszélő 11 (1984)

[845] For example written assessments submitted by one's employer and the local trade union and party units were compulsory annexes of passport inquiry forms.

VI Summary

The research question concerning this chapter was (Q8) *whether participation could function in a genuine manner in an autocratic regime?*My brief answer to this latter question is negative. The Communist Party soon recognised the potential in institutions based on workers' participation, and tried its best to harness it as fast as it could. Its tactic included the strengthening of its powers systematically in enterprise level participatory institutions, the blurring of the limits, and then the gradual elimination of shop committees' participatory functions, and trade unions' interest representation roles. The official communist party rhetoric marketed the process as the maximisation of workers' interest representation; however, the actual objective was the termination of the democratic institution of participation. The authority of shop committees, instead of being clarified, was gradually shrunk. Still in May 1946 they passed the decree on the creation of the industrial production council, and the production committees.[846] New institutions, production committees [*termelési bizottság*] were set up, charged with the responsibility of elaborating new working methods, production procedures, performance standards, and wage payment principles to ensure increased, and more efficient industrial production.[847]

Despite of the official rhetoric, participation was regarded as a sole economic tool. Theoretically it was the works councils' duty to involve through their activity the workers of the factory in the financial management of companies, in the control of production, in promoting the realisation of the plan economy, and the consolidation of the workers' ownership of state companies. At the same time it was also expressed immediately that the shaping and operation of works councils must not affect the company director's sole responsibility. The system of the plan economy narrowed their right of consultation to an even smaller area.

A further limitation came from the fact that the resolution ordered to settle issues not regulated in the resolution along the principles of 'democratic centralism', and 'mutual socialist cooperation'. But the principle of democratic centralism required that the company's well-founded, that is legitimate interests had to be ranked above those of the workers, and social interest as provided by legislation superseded that of the enterprise, or even the workers. That principle was followed also within the trade union through the fact that the lower ranking trade union organ was obliged to execute the resolutions of the higher ranking organ.[848]

However, the all-encompassing nature of the party did not make it possible to workers to exercise their participatory rights in a genuine manner. The direct forms of participation were directly controlled by the part, and the indirect forums were brought under the auspices of SZOT, which served as a "transmission belt" in the realisation of party politics, thus could not be considered as an independent organisation operated in a democratic way. Individual

[846] Decree No 6.540/1946. M. E. on the Organisation, and operation of the industrial production committees [?], and the Industrial Production Committee [Termelési Bizottság] (31 May 1946).
[847] Ibid. 1-3.§§
[848] Weltner (1961:478)

freedom rights were largely oppressed and democratic grass-root organisations were also persecuted. However, the party officials were indeed aware of its dual nature. Reform programs were halted halfway, when it became prominent that without democratisation of the society and acknowledgement of personal freedom the economic reforms could not be carried out.

VII Interim Conclusions

The importance of employee involvement – direct or indirect – in enterprises' economic activity was unquestioned; however, its actual impact if it is treated solely as an economic tool is doubtful. Participation does not appear either in the state socialist Hungarian regime or in Japan as a human right. Thus, it would be necessary to briefly introduce the stance of human rights in both analysed regimes.

Human rights form a comprehensive system, construed among others by political liberties, socioeconomic rights, workers' rights. Japan's approach to human rights was chiefly reformed after the Second World War by the Allied Powers. It is undisputed that the Japanese Constitution was written by the occupying American forces and was imposed on the defeated country 1946.[849] Before that, even though the Japanese legal system had been influenced by European (mostly German) codes already in the 19th century, justiciable human rights hardly existed. The perception on human rights is greatly determined by the Japanese value system, which encourages the assertion of group rights but this assertion is not so prevalent regarding individual rights. It is closely connected to the social norms which establish a very strong sense of duty, loyalty, reciprocal dependency and mutual service between the individual and its (work) group. As it was argued above, a group's internal relations (both vertical and horizontal ones) are very tight and long-lasting, and the pressure to adhere to the group's consensus is significant. Thus, ostracism, the punishment for too much deviation from the group's interest is a dreaded sanction. As Japan maybe called a "feudal democracy", with a few dominant actors (such as the ruling political party, the bureaucracy, the mass media and the industry federations), the recognition of individual human rights which could grant rights to persons against these domains are not so forthcoming on the state level either. [850]

Japan ratified ICCPR and ICESCR in 1979, three years later than Hungary. However, the Government has refused to ratify alongside the Optional Protocol which would grant right to individuals to appeal to international human rights court in case one's human rights are violated.[851] Ratifying the Optional Protocol thus would mean that Japan would appear front of the international community to be failing to adhere to international norms. The Japanese Governments have justified this decision by a three-fold argument. First, it is claimed that the

[849] R Goodman and I Neary (eds) '*Case Studies on Human Rights in Japan*' (Routlegde, 2013) 4.
[850] L W Beer and C G Weeramantry *'Human Rights in Japan: Some Protections and Problems'* (1979) 1 Universal Human Rights 3, 5.
[851] Hungary ratified the Optional Protocol in 1988; see, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

human right protection in Japan is so good that there is no need to provide options outside of the domestic system. Second, granting such an opportunity would be incompatible with Asian custom. Third, ratification would threaten the constitutional principle of judicial independence.[852] It is straightforward that 'group loyalty' would not permit citizens to use court to question the activity of the state.

Regarding the state socialist era in Hungary, human rights were not recognized since the autocratic regime could not afford that its power to be questioned. Acknowledgment of human rights would have meant that individuals had been granted with the right to limit the state's power.[853] It was justified by a cheesy argument that since the ruling force of the political sphere is MSZMP, the power to provide guarantees to safeguard democracy should be also vested in the Party.[854]

Individuals' international legal capacity was also denied. Even though Hungary ratified ICCPR and ICESRC, by not ratifying the Optional Protocol of ICCPR, individuals did not have the opportunity to appeal to an international human rights court. Also, the ratification of the human rights instrument did not have practical impact; both individual and collective freedom rights remained severely limited, as the concept of centralised power was not compatible with the idea of autonomous individuals or with democratically governed institutions.

Also, the notion of human rights was transposed with a different meaning both in Japan and in Hungary. In Hungary until 1972 the term 'citizens' rights' [*állampolgári jogok*] were used instead of human rights, signifying that these are rights given to individuals by the state. Thus, these rights could be subject of limitations or even to withdrawal by the state. In Japan the term *jinken* is a translation invented in the mid-nineteenth century, when Japan had to create new terminology for imported words.[855] However, the ideograph '*ken'* originally meant 'might' or 'strength' and had no connection to the humanistic morality of rights theory. It is argued that this linguistic phenomenon has contributed to the dubious stance of individual rights as something which ought to imply social irresponsibility and personal selfishness.[856]

It is not possible to have genuine participation in regimes which deny the existence or even question the importance of individual freedom. As Ales argues, the right to information and consultation is an individual right, in a sense that it should be enjoyed unconditionally by every employee, and which is exercised by the representative body of employees.[857]

---

[852] I Neary 'In Search of Human Rights in Japan' in R Goodman and I Neary (eds) '*Case Studies on Human Rights in Japan*' (Routlegde, 2013) 10-11.

[853] Marx denied the existence of human rights. He argued that human rights are individual rights which are harmful as they obstruct the interest of the community; see, Marx–Engels Összes Művei I. [Complete works of Marx and Engels Vol 1] (Budapest, 1957, Kossuth Kiadó), 367.

[854] A Holló *'Állampolgári jogok Magyarországon'* [Citizens' Rights in Hungary] (Budapest, 1979 Kossuth Kiadó), 58.

[855] New words were 'invented' in the fields of technology, sociology, law, etc. See, L W Beer and C G Weeramantry *'Human Rights in Japan: Some Protections and Problems'* (1979) 1 Universal Human Rights 3.

[856] Ibid. See also, J Chan *'Gender and Human Rights Policies in Japan'* (Stanford University Press, 2004).

[857] E Ales 'Information and Consultation within the undertaking' *in Recasting Worker Involvement? Recent trends in information, consultation and co-determination or worker representatives in a Europeanized Arena*' (Kluwer, 2009) 13. Similarly, Otto Kahn-Freund argued that the right to strike is an individual right; see, O Kahn-Freund '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe), 5 ff.

What occurs to me is not whether the right of participation is acknowledged by a regime,[858] but up to which extent individual rights are recognized. It was also argued earlier that the collective of employees does not form, legally speaking, a different entity from the members of the group. From organisational point of view it is very important how members of a work group feel about each other, how much they cooperate, how disciplined they are and so on, but even for the best collective it is not possible to achieve a legal personality or other legally recognized form of organisation distinctive from an employer.[859] Thus, it is not enough if a system is devoted to group- or collective-oriented rights, what matters is the simultaneous recognition of individual freedom and to the force of social influences on the extent and reach of individual freedom.[860] As the examples of Japan and state-socialist Hungary demonstrates, it does not make substantial difference regarding the results, whether the denial is rooted in feudal patterns or a consequence of all-encompassing Party politics, there is no substitute for individual freedom – and individual responsibility either. As Sen argues, any affirmation of social responsibility that replaces individual responsibility is counterproductive. Therefore, the state-socialist model (regardless of the way how power was exercised by the Communist party and its successors) could never achieve the intended function of worker participation, and Japan, without a change of paradigm, would not be able to meet the goals set forth by legislation.

[858] As a matter of fact, it would be futile to make any judgments based on human rights instruments which are not binding on these countries, due to their territorial or personal scope.
[859] Moreover, it would make little sense to provide legal personality for the collective as it is only important in the external relations of a company. For a detailed argument on the topic see, Cs Kollonay Lehoczky, 'Alanyok és viszonyok a vállalaton belül' [Subjects and relations within an enterprise] (Budapest, 1990, KJK) 165-204.
[860] A Sen, 'Development as Freedom (1998), xii. 283-89.

PART V
SUMMARY AND CONCLUSIONS

I Overview on Participation

Participation at workplaces encompasses different mechanisms used to involve the workforce in decisions at all levels of an organization – whether direct or indirect – conducted with employees or through their representatives. In its various pretexts, the issue of employee involvement has been a recurring theme in economic theories, industrial relations, and human right instruments. Drawing on the finding of previous works in the topic, the current dissertation set out to analyse employee involvement from a dual perspective: as an economic tool, which enhances competition and also as a human right, which develops human dignity at workplaces. The dissertation chiefly focused on forms of direct representation.

The right to participate in decisions affecting one's life is a basic value in a democratic society. This principle should be present in all areas of civil society, encompassing political and economic spheres, including workplaces.[861] Democratic decision-making is required at state level, and it is argued to be also justifiable at workplace level.[862] Involvement in decision-making which affects one's life – such as issues concerning employment – is an essential part of human dignity.[863] Without participation, workers' alienation is inevitable at workplaces, which, on a long run, involves that workers also become indifferent towards public affairs, which is a real danger to democracy as a whole.[864] Critics claim, however, that participation is often used as a manipulative device of management to weaken trade unions and control workers' mood or morals.[865]

In connection with participation I examined the notions of economic and industrial democracy. According to Sinzheimer, participation could enable all economic actors to jointly form the economic conditions of a workplace (and share related responsibility). Therefore, employees would be freed from subordination, and equality would be brought to the economic sphere. Similarly to political democracy, economic democracy could contribute to the emancipation of individual workers *vis-à-vis* economic power.[866] Sinzheimer believed that

---

[861] Cs Kollonay- Lehoczky (ed), *A Magyar munkajog II* [Hungarian Labour Law II], (Budapest, Kulturtrade) 151. (Kollonay Lehoczky n 1)
[862] R Mayer, *Robert Dahl and the Right to Workplace Democracy* (Spring 2001), 63 The Review of Politics, 228.
[863] H Sinzheimer '*The Development of Labour Legislation in Germany'* (1920) 92 Annals of the American Academy of Political and Social Science, Social and Industrial Conditions in the Germany of Today.
[864] O Kahn-Freund, *Trade Union Democracy and the Law* (1961), 22 Ohio St. L.J. 5.
[865] For a comprehensive overview on the critical approaches arising in the 1960s, see E Rehnman, *Industrial Democracy and Industrial Management – A critical essay on the possible meanings and implications of industrial democracy* (London, 1968, Tanistock), especially 67-69 and 90-91.
[866] H Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (1976), quoted by R Dukes supra 346.

political and social democracy could only exist if they are accompanied by economic democracy.

Although they are related in many ways, industrial democracy and economic democracy convey different meanings. These differences are much related to diversity in industrial traditions. Historically, industrial democracy became an effective force within workers' movement primary as an idea of representative democracy.[867] The principle of industrial democracy implies replacement of unilateral regulations with joint decisions on matters concerning the workplace or the employment conditions. Industrial democracy challenges both the authoritarian and bureaucratic structures of a capitalist enterprise and the centralized regime in the state socialist planned economies. Participation was also dissolution of the Taylorist-Fordist model, which favoured flat hierarchies and direct orders. Participation takes into account that workers are not only bearers of labour power, but members of democratic societies from which they derive a set of civil, political and social rights.[868]

Participation in decision-making processes could exist in many different ways, starting from the mere right to be informed, it could also include consultation, and, the strongest influence could be provided by means of co-determination. Employee participation could be of a different nature, depending on the models of workers representation, the public or private nature of employment relationship, the organizational dimensions of the enterprises and markets, as well as the relationship between legislative and contractual sources. Naturally, participation reflects the industrial relations systems within which it is applied. Globalization of capital, product and labour markets has increased the need for effective and functioning models of participation.[869]

Regarding terminology, the term 'participation' does not have a single, unambiguous meaning. The actual definitions include diverse notions and disciplines concerning a non-unitary and diverse set of workers' rights originating in laws or in agreements, or in both. The notion of participation (nowadays often used as synonym for involvement) in most countries is based on a distinction of powers and roles between employers and employees.[870] Through the different means of participation, workers seek to influence certain decisions made by the enterprise employing them and may also share some the economic and financial consequences of these decisions. Another interpretation considers participation as a mean to modify or

---

[867] W Müller-Jentsch and N Levis, 'Industrial Democracy: From Representative Codetermination to Direct Participation' (1995) 25 International Journal of Political Economy 3, 50-60. For an opinion contrary to this theory see, S and B Webb, *'Industrial Democracy'* (London, 1897). The Webbs considered industrial democracy as collective bargaining within trade unions.

[868] T H Marshall, 'Citizenship and Social Class (Cambridge, 1950) and W Müller-Jentsch and N Levis, 'Industrial Democracy: From Representative Codetermination to Direct Participation' (1995) 25 International Journal of Political Economy 3, 57.

[869] See for example A Bronstein, En aval, des normes international du travail: le role de l'OIT dans l'elabortion et la revision de la legislation du travail, in: JC Javillier, B Geringon (eds), *Les norms internationals du travail: un patrimonies pour l'avenir: Melanges en l'honneur de Nicolas Valticos* (Geneva, 1999, ILO) 219-49; G Casale, J *Tenkorang, Public service labour relations: A comparative overview*; Paper No 17 (Geneva, 2008, ILO); G Casale, *Globalisation, Labour Law and Industrial Relation: Some Reflections*, 55 Bulletin of Comparative Labour Law; J Schregele, *Forms of participation in management* (1976) 113 International Labour Review, 117-22.

[870] R Blanpain, Representation of employees at plant and enterprise level (1994, Martinus Nijhoff).

improve employment relationship and conditions, and in many cases, also the socio-economic conditions of the society.[871]

The system of workers' participation in company's decision-making shows considerable differences across Europe. Neither the institutional structure nor the intensity of participation is on a somehow similar level, arising from differences of basic philosophy of industrial relations between the Member States of the European Union. As Manfred Weiss points it out, in view of the heterogeneous situation it would be largely unrealistic to shape the structure of workers' participation identically throughout the EU, the most could be achieved is to approximate the systems in a functional sense.[872]

Manfred Weiss also argues that if democratisation of the economy is understood to be a promoting and stabilising element for democracy in the society as a whole, and workers throughout the EU should have a similar chance to influence decisions by which they are affected.[873] Therefore, in a globalised environment the right to participate in decision making had to be extended beyond national borders, and it became necessary for the EU to address the transnational dimension of involvement. I argued that both as an economic tool and as a human right, participation should not remain a privilege of European citizens, but have to be treated as a universal right of all workers.

II The Dual Nature of Employee Involvement

A Weimar Origins

The institutionalized system of works constitution and the form of employee representation through works council are generally connected to the labour movements of the Weimar Republic. However, some rudimentary forms of such representation could be found in earlier stage of history. The Works Council Act was a part of the framework established by the Weimar Constitution.[874] Article 165 of the Weimar Constitution provided for that workers and employees in order to look after their economic and social interests ought to cooperate with employers on an equal footing regarding the regulation of salaries, working conditions, as well as in the entire field of the economic development of the forces of production. The scheme provided for a parliamentary form of governance, similar to and parallel with that of

[871] See, for example K F Walker, Workers' participation in management. Problems, practices and prospects (1975) 12 International Institute for Labour Studies Bulletin, 9 ff.
[872] M Weiss, 'Workers' participation: A crucial topic of EU' in, R Hoffmann, O Jacobi, B Keller and M Weiss (eds), *Transnational Industrial Relations in Europe* (Hans Böckler Stiftung, 2000), 85-94.
[873] M Weiss, supra, 86.
[874] Adopted on August 11, 1919. Ceased de facto operation with the enactment of the Enabling Act on March 23, 1933.

the political state. The detailed regulations of Factory Works Councils were promulgated in the Act on Works Council, but District Workers Councils and the National Economic Council had never been set up.

The Act on Works Council constituted the most extensive and most important piece of social legislation of its times. It touched upon almost every phase of labour and social legislation, such as the Code of Industrial Regulations, the law concerning collective agreements, labour exchanges, mediation and arbitration. Even though the final text of the law was compromised, its significance is unquestioned.

In the light of the provisions of the Weimar Constitution, the dual nature of employee involvement appears in a sprouting form in the Works Council Act. First, the concept of 'collective economic interest' of the employees and the envisaged parliamentary form of interest representation through District Works Councils and the National Economic Council projects the Sinzheimerian ideal of economic democracy. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties.[875] In Sinzheimer's views, the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations, which is essential to safeguard their human dignity. Second, the furthering of the 'economic aims' of the establishment appears as a common goal of both labour and capital, for which they ought to strive in a cooperative manner. However, such cooperation was only possible if the economic aims of the establishment were not identified with the profit-maximizing tendency of the employer/owner, but rather with efficiency and the highest possible productivity, aiming for an economic operation.[876]

The concept of an economic constitution and the idea of works councils have long survived the overthrow of the Weimar Republic.[877] The economic democracy theory was much more than the transfer of parliamentary forms of democracy to workplaces, but more importantly it conveyed the principle of democracy and the resolving of industrial conflicts through dialogue. The Works Council Act incorporated the duty of an employer to consider not only the interests of shareholders, but also those of the employees. The contemplation of employees' interest improved the living and working conditions of workers, thus largely contributed to better social development. Participation also introduced an important limitation on the misuse of economic power of employers. By establishing the long-term development of an establishment as a shared goal of labour and capital, the responsibility for the economic decision was also shared between the parties, but in a proportionate manner, which created a productive balance of interest. When seen this way, participation was an important factor in the stabilisation of the economic and social order. Last but not least, the Weimar model of participation chiefly influenced the current employee involvement system of Germany, which has had further impact on the European model of participation.

---

[875] Hugo Sinzheimer, *Eine Theorie des Sozialen Rechts (1936) XIV Zeitschrift für öffentliches Recht*, quoted by Ruth Dukes '*Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the role of Labour Law*' (2008) 35 Journal of Law and Society 3, 346.

[876] Section 66 Para 1 of the Works Council Act of February 4, 1920.

[877] For a detailed analysis of the Weimar Republic see, P Fritzsche *'Did Weimar Fail?'* (1996), 68 The Journal of Modern History 3, 629-656; and H Mommsen, *'The rise and fall of Weimar democracy'* (UNC Press Books, 1998).

B Employee Involvement as a Question of Economic Competitiveness

The research questions regarding this chapter were (Q1) *What are the most influential economic theories concerning employee involvement?* and (Q3) *What was the impact of employee involvement on mitigating the adverse effects of the economic crises?*

The economic input of employee involvement has been researched for decades, many hypotheses exist on both sides, aiming to prove either the inefficiency or the efficiency of employee involvement. The economic analysis of employee involvement started with the emblematic question of Jensen and Meckling asking "if co-determination is so efficient, why do managers not choose it voluntarily?"[878] Proponents of the efficiency theory, Freeman and Lazear answer the above question by examining the voluntary or mandatory nature of works councils. Freeman and Lazear suggested that the social gains from employee involvement could only be maximized if the rules governing information and consultation processes are carefully bound the power of labour and management, as well as fit the broader industrial relations system in which the representative bodies function.[879]

Path dependency theories have been developed after the heavily contested[880] proposal of Hansmann and Kraakman, arguing that there is a "normative consensus" that corporate leaders should run the company in the best interest of their shareholders. In contrast, Roe argues the different factors lying behind path dependence, such as culture, politics and legal systems; therefore opting-out from the established system is extremely difficult despite the existence of more efficient alternatives. Thus, the high transition costs of deviation may lock out socially desirable innovations. [881]

Property rights theories in economy have addressed the problem of specification of individual rights that determines how costs and rewards are allocated among the participants of the organization. [882] Human Resource Management theories approach employee involvement, from an organisational efficiency point of view, acknowledging that managers are no longer seen as the sole custodians of authority, and employees are able to bring their workplace experiences to the decision-making table, therefore decisions are better supported. Findings suggest that at workplaces where employees had a greater amount of influence on

[878] Jensen and Meckling 1976:9.
[879] Freeman and Lazear 1983: 50.
[880] See for example D Kershaw, '*No End in Sight for the History of Corporate Law: The Case of Employee Participation in Corporate Governance' (2002)* 2 Journal of Corporate Law Studies 34; J Michie and C Oughton, '*Employee Participation and Ownership Rights'*, *(2002)* 2 Journal of Corporate Law Studies 34.
[881] For example, M J Roe, '*Chaos and Evaluation in Law and Economics*' (1996) 109 Harvard Law Review 641-68; M J Roe '*Can Culture Constrain the Economic Model of Corporate Law?' (2002)* 69 Chicago Law Review 1251.
[882] Started with Ronald Coase's theory and was extended by Alchian, Demsetz and others.

decision making the satisfaction level and productivity of workers is higher,[883] and genuine involvement in decision making successfully reduce organizational change cynicism.[884]

Regarding behavioural economics theories, Elton Mayo's experiment was analysed together with a series of experiment conducted recently by Dan Ariely, Emir Kamenica and Drazen Pralec at Massachusetts Institute of Technology and at Harvard University.[885] Researchers concluded that increased productivity and genuine participation in workplace decisions strongly correlate.[886] I also looked into the possibility to make employee involvement compulsory at workplaces. Whereas the default setting with opting-out options could be justified in many areas of labour law, I argued that it is not suitable to facilitate employee involvement.

Regarding (Q2) *What was the impact of employee involvement on mitigating the adverse effects of the economic crises?* I reviewed practical evaluations of participation in workplaces. I selected four recent studies[887] examining the performance of companies during the crisis and all of them argued that social dialogue at national, sectoral and company levels have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis.[888]

I compared the views of Hugo Sinzheimer and Amartya Sen on the interrelated nature of economic, political and social democracy, as well as on individual freedom. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties.[889] On a Kantian recognition of human dignity,[890] Sinzheimer argues that the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations.[891] Sen, challenging the "Lee Thesis",[892] asks the

---

[883] S Schiwochau et al, '*Employee Participation and Assessments of Support for Organizational Policy Changes*' (1997) Journal Of Labour Research, Vol. XVIII, No 3, 379.

[884] M Brown and C Cregan '*Organizational Change Cynicism: The Role of Employee Involvement*' (2008) 47 Human Resource Management 4, 667-86.

[885] Dan Ariely, Emir Kamenica and Drazen Pralec, '*Man's search for meaning: The case of Legos'* (2008) 67 Journal of Economic Behavior and Organization, 671-77.

[886] Different conclusions were drawn by O E Williamson, '*The Economic Institutions of Capitalism'* (1985) 40-41.

[887] C E Triomphe, R Guyet and D Tarren, '*Social Dialogue in Times of Global Economic Crises'* (Eurofund, 2010), V Glasner and B Galgóczy, '*Plant-level responses to the economic crisis in Europe'* (ETUI-REHS, 2009), I Guardiancich (ed) '*Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia'* (ILO (EC), 2010); B Segol, M Jepsen and P Pochet (eds) '*Benchmarking Working Europe 2014*' (ETUI-ETUC, 2014,); S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), Cluwaert, I Schömann, 'European social dialogue and transnational framework agreements as a response to crisis?' (2011) 4 ETUI Policy Brief

[888] S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), 75.

[889] Dukes, supra 346.

[890] Kant has phrased the principle of human dignity in the archetypal maxim that what possesses dignity must not be treated purely as a mean but also as an end in itself; for more on Kant's approach to human dignity see, O Höffe 'Kant's innate right as a rational criterion for Human Rights' in L Denis (ed) *Kant's Metaphysics of morals: a critical guide* (Cambridge, 2010, CUP), 71 ff.

[891] Dukes, supra 345.

[892] Sen argues against the 'Lee Thesis', named for President Lee Kuan Yew of Singapore, which states that denying political and civil rights is acceptable if it promotes economic development and the general wealth of

question of what should be more urgent for policy makers: to eradicate poverty, or to guarantee democratic rights (for which poor people have little use anyway)? Sen's answer to this question is very straightforward: economic development and liberty are interconnected. Separating them or prioritizing one over the other is entirely the wrong approach. Without freedom, including the opportunity to participate in decision-making on matters affecting the main areas of an individual's life there is no economic development. Likewise, economic development fosters individual and social freedoms.[893]

C Employee Involvement as a Human Right Issue

The research question concerning this chapter was (Q3) *How employee involvement is addressed in human rights instruments?* To answer this question I first examined the human rights nature of employee involvement and found that while human rights are primarily oriented toward limiting the power of a state, labour rights are predominantly aiming to limit the power of private actors in the market. Regarding human rights, principal right-holders are individuals while labour rights are more collectively orientated. As oppose to human rights, which are universal and possessed by all human beings by virtue of their humanity, the entitlement in case of labour rights can be defined as the set of rights that humans possess by virtue of their status as workers.[894] However, this status is rather fluid and the identity of the beneficiaries of labour rights is contested. The collective of employees is a part of an undertaking, it lacks internal structure as they position within the undertaking is defined by the unilateral decision of an employer; and the group has no influence on its membership either. Moreover, individuals could perform work in great many ways for an undertaking.[895]

The human right nature of employee involvement has long been questioned. The 'older brother' of participatory rights, the right to bargain collectively gained recognition in a much less contested way and now is acknowledged by most major human rights instruments.[896] In the contrary, employee involvement first appeared in 1988 in the Additional Protocol to the European Social Charter.[897] A year later, the Community Charter of Fundamental Social Rights of Workers also incorporated it,[898] and subsequently it appeared in the Charter of Fundamental Rights of European Union. However, the right to involvement does not appear in human rights instruments outside of the aegis of Europe. The low

---

the population (Sen, 1999:15). He rightly insists that we should approach political freedoms and civil rights not through the means of eventually achieving them (GDP growth) but as a direct good in their own right. Freedom is also good because it creates growth. See, O'Hearn 'Amartya Sen's Development

[893] A Sen (1999) 158.

[894] K Kolben '*Labour Rights are Human Rights?*' (2010) 50 Virginia Journal of International Law 2, 449.

[895] Due to its diverse nature, even in state socialist legal theories, the idea that the collective of employees has a special legal nature could not find solid support See for example the Eörsi-Weltner argument.

[896] For example, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

[897] The Additional Protocol came into force in 1992.

[898] Community Charter of Fundamental Social Rights of Workers (1989), Arts 17-18.

recognition could raises concerns whether the right to involvement is a fully fledged human right. The regulatory technique of the European Union used for labour right in the above mentioned human rights instruments could also be seen as an area of concern. These instruments require certain level of adjustability to the national characteristics of the Member States. Therefore, the instruments do not define the notion of employee. However, the delegation of the specification the scope of the right-holders to national laws could lead to highly diverse practices. The uneven level of protection could therefore result in significant inequality not only in the relation of workers with different contracts of the same employer, but on international level too. Thus, such multiplicity in the actual personal scope could dilute the intended protection and further alleviates the recognition of employee involvement as a human right.

The term 'workers' participation' as used by the ILO could be seen participation in decision-making at the enterprise level. The Philadelphia Declaration (now an Annex to the Constitution of the ILO) calls on the ILO to draw up programs to promote 'the cooperation of management and labour in the continuous improvement of productive efficiency'. [899] To implement this call, the ILO has created series of general principles. However, no convention has been adopted on information-consultation; thus, the Organisation uses soft law instruments. The normative framework of the ILO on information and consultation contains recommendations and declarations – measures which do not have the binding force of the conventions and are not subject to state ratification.

The European Social Charter (ESC) is a human right convention of the Council of Europe, which establishes a wide range of economic and social rights that are indispensable for human dignity. Article 21 of ESC provides for the right to information and consultation, and Article 22 specifies the right to participation in determining working conditions. The Revised European Social Charter of 1996 addressed a specific involvement issue, the right to information and consultation in the case of collective redundancies.

It has been log argued that the Europeanization of industrial relations plays an indispensable role in the strengthening and the further development of the social dimension of the European integration. As a part of the integration process, first the Community Charter of the Fundamental Social Rights of Workers (CCFSR) and subsequently the Charter of Fundamental Rights of the European Union (CFREU) recognized the rights of workers to information and consultation.[900]

The inclusion of social and economic rights related to working life into the CFREU confirms that these are to be considered fundamental to the EU social model, what it means to be an EU citizen.[901] Thus, the right to information and consultation is a fundamental right in the context of the EU, and Article 27's reference to national laws and practices implies that the Member States are obliged to maintain at least the mandatory standards of information and consultation provided by statutory law or by collective agreements. The aim of Article 27 is to protect the interests of the individual worker against the dominant position of the employer in situations in which those interests could be substantially affected. Apart from the need to protect workers in extraordinary situations, such as collective redundancies and

[899] III. e
[900] Community Charter of Fundamental Social Rights of Workers (1989), Arts. 17-18.
[901] Bercusson, supra at 27.

transfers of undertakings, Article 27 also reflects the difficulties associated with globalization of the economy and the increased importance of transnational companies and mergers of undertakings.

Blanke argues that Article 27 has as much or more to do with the protection of human dignity specified in Article 1 of the CFREU than with traditional social rights and the objective of democratisation of the economy. As such it promises greatly to expand the scope both of traditional
social rights and of practices of democratisation, to encompass threats to workers' dignity in the many new forms these threats assume in a globalised economy, society and environment.'[902]

Despite the fact that employee involvement signifies a very narrow part of human rights, and perhaps it is safe to say that its recognition is rather low, its importance shall not be overlooked. The European Social Charter is a human right convention of the Council of Europe, which establish a wide range of economic and social rights that are crucial for human dignity. Due to its wide geographic coverage, its role is indispensable in promoting human rights across the European continent. The CFREU addresses issues which form the core of labour law and industrial relations in Europe. Thus, inclusion of the right to information and consultation in this instrument signifies the stance of employee involvement as a fundamental human right.

The significance of employee involvement in the development of democratic institutions is enormous. The estrangement of people from the handling of their own affairs at a workplace in a long run will lead to the abdication of not only the employees but the citizens towards participation which is a real danger to democracy. Thus, employee involvement shall be seen as essential to issues of social justice, human rights and democracy and must be promoted as such.

Considering the approach of the Weimar Republic regarding employee involvement as a starting point, followed by the provisions of the human rights instrument and by the various economic theories developed in past decades, it is proved that – EMPLOYEE INVOLVEMENT HAS A DUAL NATURE: IT HAS TO BE REGARDED BOTH AS AN ECONOMIC QUESTION AND AS A HUMAN RIGHT (H1).

[902] Blanke, supra at 50.

III Global Extension of Democratic Participation

A The Transnational Model – Employee Involvement in the European Union

The European Union addressed employee involvement in general in three major directives,[903] the European framework directive on information and consultation (2002/14/EC), the (recast) directive on European works councils (2009/38/EC) and the directive on employee involvement in the European Company (2001/86/EC).

The Framework Directive provides for minimum requirements applicable throughout the Community[904] and leaves the practical arrangements to be defined and implemented in accordance with national laws and industrial practices.[905] This ambiguity provides considerable room for Member States to manoeuvre when they decide on their own domestic system, which could lead to uneven level of protection to workers of different countries. This shortcoming is especially visible in the national measures concerning the definitions of an undertaking and an establishment, the practical procedures, the notion of confidentiality, the protection of the employees' representative, and the issue of sanctions.[906] Though Directive 2002/14/EC was crafted with the best intention and manoeuvred pretty well between the fairly different interests and traditions of industrial relations of the Member States, the sometimes vague wording and the ample room for national transpositions resulted in a variety of domestic systems with very different level of actual rights and obligations. Practically, such a flexible framework is not suitable to provide equal level of information and communication for workers of the European Union.

Council Directive 94/45/EC[907] introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies on the progress of the business and any significant decision at European level that could affect their employment or working conditions. This Directive was repealed and replaced in 2009 by the recast Directive 2009/38/EC.[908] The EWC Directive provides for the establishment of a European Works Council or an Employee Information and Consultation

---

[903] Besides this general frame, a range of directives secure the right of information and consultation of workers in specific situations, such as in case of collective redundancies (98/59/EC), transfer of undertaking (2001/23/EC). The directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EC) also contains important regulations on participation. In total, more than 15 directives deal with information and consultation in some kind of a general or specific sense and thus form part of the social *acquis* in this regard.
[904] Art. 1.1. of Directive 2002/14/EC.
[905] Art 1.2. of Directive 2002/14/EC.
[906] Schömann (2006) supra 15.
[907] OJ [1994] L122/28.
[908] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 OJ L 16.5.2009 28-44.

procedure. Negotiations are put in focus with the aim to activate central management or employees.[909] The parties either could decide to set up a European Works Council by concluding an agreement on the scope, composition, function and term of service of an EWC; or could agree to implement an Information and Consultation Process (ICP) instead, a less formalized form of employee involvement.[910] Whether a EWC or an ICP is established, the minimum requirements provided for by the Directive do not need to be incorporated into the agreement.[911]

The learning curve from the 1980s has been indeed very long and many of the initial problems have been addressed in the amends of the respective Directives. The change in the regulatory technique allowing more room for Member States for transposition with regard to the different traditions in industrial relations catered better for employee involvement. However, researches showed that such flexibility the actual implementation of the respected Directives resulted in great inequalities in national laws for the detriment of workers. The ambiguity is rising from the sometimes vague language of the Directives and the lack of appropriate enforcement mechanism, including sanctions.

The research question I tried to answer in this section was (Q4) *If employee involvement is a fundamental human right, thus, in that sense, has a universal value, what measures have been taken to promote it outside of the European terrain?* The trend of globalization has brought many new challenges to business management. The competition has become fiercer, and the quest for profit maximization has made large concerns spur on social dumping to continuously fight for yet lower production costs. Such practices often lead to human rights violation at workplaces. The frequency and the severity of these malpractices tend to be higher in premises where national laws are less protective and the influential power of workers is low. Due to the lack of regulatory power of the EU, European based multinational companies are not obliged to respect the protective rules of the EU. MNCs tend to draw up internal codes of conducts (COC) to promulgate minimal standards to be applied by their subsidiaries and subcontractors. These internal rules however are often proved to be non-efficient in most of the fields they intend to regulate, including halting human rights violations, to improve working standards, or to enhance the voice of workers. Moreover, these company statues do not form a ground for liability when the rights of workers are violated.

While the EU considers employee involvement as a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by the globalisation,[912] it explicitly reserves the right to the employees working within the territory of the European Union. Since human rights are indivisible and universal, it raises the issue of how the existing level of protection provided by the EU could be transferred to subsidiaries of Europe-based MNCs located outside of the territory of the European Union. The limited personal scope of legal instruments (European Social Charter, CFREU, various EU Directives) concerning employee involvement overlook the fact that transnational companies often operate subsidiaries outside of the Member States/Contracting States. The activity of these undertakings significantly contributes to the overall performance of a group, and the

[909] Art. 5.1. of Directive 2009/38/EC.
[910] Art 4.1. of Directive 2009/38/EC.
[911] Art. 6.4. of Directive 2009/38/EC.
[912] Directive 2002/14/EC Recital (9)

different (generally lower) standards of the non-EU countries constitute a competitive edge for most European multinationals. The research question followed from these findings was, (Q5) *What role the European Union could have in better safeguarding employee involvement, as a fundamental human right?*

In its opinion the EESC urges the European policy-makers to create appropriate incentives and improve the requisite legal framework with no interference with the national competences though. Further, the EESC implies that European company law shall cater more for employee involvement. The role what employee involvement could play in regaining economic competitiveness underlines the need for corrective actions against the short-term of corporate values and for increased corporate transparency.[913] Though the Opinion envisages an innovative approach to mitigate the negative effects of economic turmoil by strengthening the role of employee involvement in business management, it only focuses on business activities located in the territory of the European Union. Such limited territorial scope overlooks that transnational companies often operate subsidiaries outside of the Member States. The activity of these undertakings significantly contributes to the overall performance of the group. To mention one aspect, transnational companies often benefit from the cheap labour force and low influential power of the employees working in non-Member States. While acknowledging that the different albeit generally lower standards of the non-EU countries constitute a competitive edge for most European multinationals, consolidation of the business practices cannot be complete if it does not reach out to the branches situated outside of the European Union.

To overcome this discrepancy, I made a normative proposal to change the personal scope of Directive 2002/14/EC on Information and Consultation together with Directive 2009/38/EC on the European Works Council to ensure that all employees employed by a European multinational company have sufficient access to information and are consulted on matters relevant to their employment. Both directives are equally important in that sense, as Directive 2009/38/EC is the 'agent' which enables employees to have access to information and serves as a forum for consultation.[914] Even though the EU is reluctant to refer to extraterritorial jurisdiction, there is an example for external action in environment protection.
One of the biggest challenges to controlling the activities of European corporations operating outside of the territory of the EU is the territorial sovereignty of States. The exercise of extraterritorial jurisdiction faces both legal and political obstacles. A general rule of international law affirms that one state cannot take measures on the territory of another state by means of the enforcement of national laws without the consent of the latter. Such an expansion of the competences, especially in the field of employment and industrial relations, is not free from controversy. On the other hand, the international scope of the activity of the European Union have to be guided by principles which have inspired its own creation, development, and enlargement, and which seek to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the

[913] Opinion of the EESC on Employee involvement and participation as a pillar of sound business management and balanced approaches to overcoming the crisis, SOC/470, Brussels, 20 March 2013, Points 2.5 and 2.6.
[914] Art 1. 2 of Directive 2009/38/EC.

principles of the United Nations Charter and international law.[915] The importance of employee involvement both as a human right or and as a tool to enhance economic competitiveness is significant regarding democracy.[916] Thus, the second hypothesis (H2) DUE TO ITS HUMAN RIGHTS CHARACTER, EMPLOYEE INVOLVEMENT CANNOT BE REGARDED AS A PRIVILEGE OF EUROPEAN CITIZENS, BUT HAVE TO BE TREATED AS A UNIVERSAL RIGHT OF EVERY WORKER AND HAS TO BE SAFEGUARDED WITH SUFFICIENT LEGAL PROVISIONS was proved to be correct.

Moreover, observations Sinzheimer made on the function of labour law are important to be remembered here. Protection of employees has essential importance to society, as the working power of man is not only an individual but also a social asset.[917] The worker serves the employer directly, but also serves society indirectly, argues Sinzheimer further, and thus society owes the worker an equivalent return for his service, and this equivalent return is the protection itself.

On a Kantian recognition of human dignity,[918] for Sinzheimer the democratization of the industrial sphere through the economic constitution might have brought equality and real freedom for workers—freedom which is not manifested in the way that freedom of contract allowed exploitation, but freedom from subordination in employment relations. The right to employee involvement has to be kept protected both as a fundamental right and a tool to enhance economic competitiveness. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of the humanity of workers through involvement ought to be seen as a shared responsibility of global economic actors.

B Participation Model of the New Hungarian Labour Code

Political changes were rather rapid in Hungary, between 1988 and 1992 key legislative movements laid down a completely new system, including industrial relations. Act No XXII of 1992 – the third Labour Code – was based on the principle of freedom of association and strived to create genuine, democratic form of participation. As a part of the reforms, works councils were institutionalised, although it is argued that the introduction of works councils was lacking genuine historical origins or theoretical foundations.[919] Decisions of the

[915] Art 205 of TFEU and Art 21 of TEU.
Sinzheimer believed that political and social democracy could only exist if they are accompanied by economic democracy. In his view, economic democracy has two complementary pillars: the self-regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy. See, Hugo Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden*, Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law (2008)* 35 Journal of Law and Society, 346; Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law*, (2012-2013) 34 Comp. Lab. L.& Pol'y J. 605-7
[916] Art 205 of TFEU and Art 21 of TEU.
[917] Dukes, supra 345.
[918] Ibid.
[919] Gy Kiss, *Munkajog* [Labour Law] (Budapest, 2005, Osiris), 451-53.

Constitutional Court concerning trade unions also shaped the reforms of industrial relations and had important, yet rather detrimental impact on the bargaining position of trade unions.[920] The Constitutional Court rendered its decision considering the provisions of Article 54(1) of the Constitution on the right of disposal. The right of disposal is an integral part of the right to human dignity declared in as a natural right of which no one may be deprived. The Constitutional Court stated that the right of disposal is a "general right to personhood", which encompasses various aspects of personhood, such as the right to free personal development, the right to free self-determination, general freedom of action or the right to privacy.

Due to the recent re-codification of Labour Law in Hungary, it seemed important to examine the changes concerning employee involvement in Hungary. While Act No I of 2012 maintains the democratic principles of its predecessor concerning works councils, it has brought significant changes to the regulation of industrial relations. Since the changes substantially affected the stance of works councils, the research question articulated regarding this matter was (Q6) *Whether the provisions of the new Hungarian Labour comply with the European norms, such as the European Social Charter and Directives 2002/14/EC and 2009/38/EC?*

The new Labour Code successfully cleared away most of the confusion originated in the horizontal dual channel model of Act No XXII of 1992; however, my findings concerning the rights of works councils are rather negative. The preference of the lawmaker towards works council over trade unions is by and large exhausted in declarations, unfortunately works councils do not possess stronger rights than before. The Labour Code defines the function of works council as an institution which monitors the compliance of employers' practices with the employment regulations. However, the existing rights of works council are not sufficient to provide effective control over employers. The protection of employee representatives also raises concerns. Whereas it is uncontested that 'regular' members of works council deemed employee representatives (for example the regulations concerning confidential information are binding on them), only the chairperson is protected against unfair dismissal. This practice goes against the requirements set forth by Directive 2002/14/EC and violates Article 22 of the European Social Charter as well as the provisions of ILO Convention No 135.[921]

The available remedies for violating the regulation concerning employee involvement are not as effective as they were before. Further to this, the sanctions related to the unlawful practices of employers, eg, the violation of information, consultation and co-determination rights are not dissuasive enough to prevent the malpractice of employers. However, it is argued that without dissuasive sanctions and proper remedies, the right to conclude a workplace agreement covering subject matters of a collective agreement is not a sign of empowerment of works councils, but a rubber stamp on the workplace rules unilateral drawn up by employers.

As a conclusion, it would be required to review the provisions concerning works councils. Whereas revision of some regulations would require redesigning the industrial relations, revisiting sanctions and extending the protection to work council members would be

[920] 8/1990 (IV.23.) ABH and 42/1991 (VI. 23.) ABH (Constitutional Court decision).
[921] Hungary ratified ILO Convention No 135 in 1972.

easily achievable, yet immediately required to meet the conditions set forth by EU Directives and the European Social Charter.

IV Non-Democratic Participatory Models

A The Japanese Model of Participation

Japan has gone through rapid economic and political transformation after the war, but such change was not accompanied by the evolvement of democratic values in the society.[922] However the legislative environment has changed noticeably in favour of employee participation over the years, deficiency in workers' influencing ability is still remarkable. The 'life-long employment' system, a flagship institution of Japanese labour market, completely lacks democratic decision making processes and its underlying philosophy has attempted employee participation to gain acceptance in the corporate culture. On the other hand, possibly due to the weak perception of democracy in a society as whole, employees working outside of the life-long employment system have not been able to implement participation rights at their workplaces either, despite the fact that the legal environment has persuaded labour and management to include such institution more fully to their decision making processes. The research question I examined in this chapter was *how the traditional decision making patterns influence employee Involvement in Japan?* (Q7)

While technical development and production efficiency were remarkable after the end of the Second World War, much less development and modernization could be traced in internal relations of the production units. The feudal relations were deep-rooted in the society and tied production methods to the commodity production patterns with its master-servant relations. The reform programs initiated by the Occupation were thrown onto a relatively immature system of industrial relations. The major pieces of labour legislation were not products of gradual, bottom-up developments. The Occupation's labour policy, alongside the economic reconstruction, was a part of the defeudalisation process.[923] It included the total demilitarisation and the transformation of the social and economic forces that had had a major role in the "imperialist adventure" of Japan.[924]

Changing the industrial relations was one of the top priorities for SCAP in 1945.[925] General MacArthur believed that trade unions are "schoolhouses of democracy", and re-establishing them would help preventing future aggression and supply workers with democratic ideals, as well as serve

[922] See for example, M Schalber, *'The American Occupation of Japan: The Origins of the Cold War in Asia'* (OUP, 1985); M E. Caprio and Y Sugita, *'Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society'* (Taylor and Francis, 2007); CJ Coyne, *'After War: The Political Economy of Exporting Democracy'* (Stanford University Press, 2008).
[923] Takemae 2003:307
[924] Ibid.
[925] Supreme Command of Allied Powers

as a general index of political liberalisation.[926] The newly enacted regulations had a revolutionary impact on the long-repressed labour movements. In a couple of months, unionisation rate surpassed the pre-war peak and the upsurge had been continued until 1949, when the unionisation rate was more than 50 per cent.[927] After the surrender, the corporate leaders, still under the shock of total defeat, had not developed a coherent economic vision. Trade Unions, on the other hand, via shop-floor activities, managed to create their own voice in how to run the company, brought up plans for industrial recovery, and pressed for higher wages.[928] Trade Unions had major impact on reordering the economy, and through their members they had decision making power in the everyday work, effectively realising economic democracy.[929]

Production-control struggles radically pushed workers to take over production. Intelligence recorded several attempts, involving altogether almost 40,000 people, which aimed for workers self-management.[930] After the radical demonstrations in 1946, SCAP promptly drafted a harsh public security ordinance, sentencing those who are engaging in 'act prejudicial to Occupational objectives' to prohibitive fines and prison terms of up to 10 years at hard labour.[931] The 'schoolhouses of democracy' seemed to be shut down. The formal prohibition of the strike was a turning point in the Occupation.[932] It was a denial of workers basic right, which had just been declared by the Occupation two years before. The reasoning, that the Japanese economy and society was not mature enough to deal with the general work-stoppage recalls the patriarchal rhetoric of the *tennosei*.

The same patriarchal tone is detected by Woodiwiss in the way how the New Constitution of Japan[933] declares the rights and duties of workers.[934] Woodiwiss claims that in such legal environment, other labour laws, namely the Labour Relations Adjustment Law of 1946 and the Labour Standard Law of 1947 had no choice but follow the pre-war state partiarchalism.[935] Therefore, as Woodiwiss points it out, the employment relation in Japan remained very much a status relation rather than a contractual one.[936]

According to Nakane's comprehensive analysis on Japanese society,[937] it shall be assumed that workplaces have dedicated role in the employees as well as their families' life. Nakane argues that the kinship which is normally seen as a basic unit of human attachment is replaced in Japan by a personalised relation to a corporate group based on work. This is called *marugakae*, which could be translated to English as 'under patronage'. The company has a fairly patriotic approach towards the employees, providing workplace security and more or less steady employment conditions. As a return, the employer requires unconditional loyalty to the group (eg, the employer) and sacrifice of the employee's ties to other groups, including emotional participation. The Japanese concept of such 'one-ness' refers to the ultimate integrating power of the group which restricts the behaviour of its members, including that of the leader himself. Albeit stable, a system based on unchangeable social manners is rigid. Institutional position and title defines the employee's position in the company and individual

---

926 Takemae 2003: 311
927 The number of the union members was around 7 million workers. Schonberger 1989:115
928 Takemae 2003:314
929 Ibid.
930 Takemae 2003:314
931 Imperial Ordinance no. 311, issued on 12 June, 1946.
932 Takemae 2003:320-321
933 Also drafted by SCAP
934 Woodiwiss 1989: 102
935 Toyoda 2007:68
936 Woodiwiss 1989:111
937 Nakane 1972

traits or achievements are overlooked. It links to one of the characteristics of the Japanese employment system, which is addressed as the 'seniority based promotion and wage systems'.

Extreme consciousness on hierarchy affects intra-group communications. Junior members carefully avoid any open confrontations with their superiors. The avoidance of the expression of one's negative opinion rooted in the fear that it may disrupt the harmony of the group, which could easily jeopardize one's position within the group. Therefore the expression of opinion in a group is pretty much determined by the group member's position which negatively influences the limits of freedom of speech. Opposing the majority could lead to isolation within the group and could be subjected to various disciplinary measures. The authority of the seniors is unquestionable and juniors ought to carry out orders without the slightest sign of hesitation. Refusal or even questioning is a trace of disloyalty and considered as a violation of the group integrity.[938]

Any popularity or recognition awarded to the individual shall be enjoyed by the group and not the individual and no individual popularity shall exceed that of the senior or boss, otherwise the harmony of group is breached.[939] Individual freedom of action is also limited by the radius of the group, actions shall always be for the group and decision making is allowed only in direction provided by the group. On the other hand, the leader of the group is far from autocratic. In fact, the better and stronger the leader, the more strongly he is able to tie subordinates emotionally. In this paternalistic relation protection is repaid with dependence, affection with loyalty. Thus the leader is never independent or separable from the group, but a part of the organization up to the point that he has almost no personal identity and surrenders himself for the interest of the group.[940]

This mutual dependence is manifested in the consensus-looking decision making system of *ringi-sei*. In *ringi-sei* the decision making right is not dedicated to a specific member of a group, but all input is seemingly considered before the final conclusion. Group cohesion is strong, therefore no individual liability (not even that of the leader) is presumed in case of mistakes. Though it is often labelled as democratic decision making process, due to the interdependence of the group members and their leader, balance and stability within the group can only be maintained on the expense of the minority.[941] The *marugakae* does not allow individuals to take their own actions or decision, as in every moment they are controlled by the group. Joint decision making blurs the boundaries of leadership and – at least on the surface – enhances group cohesion. Yet the lack of clear responsibilities and liability indirectly increases the individual's dependence on a group.

The 'Japanese miracle', the rapid growth of the economy and striking success of Japanese companies on both domestic and international markets after the wartime destruction directed much attention to Japanese industrial relations, which are often characterized as harmonious. The consensus-oriented decision making processes of management was also put into spotlight as a backbone of economic democratization. However, the threat that someone becomes the one who disturbs the harmony of the group could easily be converted to

[938] On decision making processes in academia see Ferber 2012:152-153

[939] Japanese put a lot of emphasis on group harmony or *wa,* the harmonious integration of group members which has multiple layers.

[940] Nakane 1972:57, 69. In fact there is no Japanese expression for leadership, it is explained by the senior-junior (*oyabun-kobun*) relationship.

[941] Nakane 1972:53

monetary loss. This personal insecurity was detected by Turner too; workers often explained their passivity by the ultimate fear of losing their jobs and therefore of endangering their (and their families) livelihood.[942] This sense of powerlessness contributes to the fact that employees feel themselves rather like subjects than participants. Frustration occurs when decision are made by the employer affecting the daily life of the employees, without sincere consultation and tension between labour and management remains, but well covered by the indirectly forced silence of the former one. Anger and betrayal are, in turn, lead to apolitically.

Japan has been treated as the fortress of industrial democracy mostly because of the well-established informal ways of participation. However, in reality it is much hindered by the lack of actual democratic conduct within the workplace units, including trade unions. The exaggerated hopes in the reinforcement of the informal ways of participation are only able to masquerade the inherent conflicts between labour and capital, but cannot substitute the genuine democratic decision making processes. As Otto Kahn-Freund warns us, the false belief of "unity", meaning that there are not really two sides of the industry, would easily lead to suppression of trade union activity and paternalistic attitude of the employer towards its employees, yet there is no possibility to eliminate the conflicts – the immanent ingredients of all industrial societies.[943]

Not denying the importance of joint accountability and collective achievements as an ethical integrating power of the community under certain circumstances,[944] the principal of personal responsibility shall however be emphasised. To empower human dignity one must not accept that anyone else has the right to impose personal values on others without that person's endorsement.[945] However, as Kahn-Freund stated elsewhere, freedom is ambiguous and misleading in labour relations, as the employees' will is only legally, but not socially free; thus the principal purpose of labour law is to support the balance between the power of management and labour. Nevertheless, legal regulations are secondary in influencing the forces of the labour market, and can only make a modest contribution to the degree of effective organisation of the workers.[946]

B Participation during State-Socialism in Hungary

The beginnings of the Hungarian works council movement had many similarities with that of the Weimar Republic. Restarting production and creating social justice through worker participation and achieving fair redistribution were the key goals of the movements. Also, the early legal regulations were in both cases blurry, the exact rights and duties of works council

[942] Note that households with one income were in gross majority until recently.
[943] Kahn-Freund 1972:20
[944] Dworkin 1998:455
[945] Ibid.
[946] Kahn-Freund 1972:3-16

were not clear, providing grounds for numerous law suits between factory owners and works council representatives.

However, in Hungary the Communist Party soon recognised the potential in institutions based on workers' participation, and tried its best to harness it as fast as it could. Its tactic included the strengthening of its powers systematically in enterprise level participatory institutions, the blurring of the limits, and then the gradual elimination of shop committees' participatory functions, and trade unions' interest representation roles. The official communist party rhetoric marketed the process as the maximisation of workers' interest representation; however, the actual objective was the termination of the democratic institution of participation. The authority of shop committees, instead of being clarified, was gradually shrunk. New institutions, production committees were set up, charged with the responsibility of elaborating new working methods, production procedures, performance standards, and wage payment principles to ensure increased, and more efficient industrial production. Political cleansing was used to increase the control of the Party. The role of the trade unions, too, changed. In accordance with the new guidelines, their main task is to organise, increase production, and organise socialist work contests, and rationalising work processes in the factory, completely overshadowing the role of interest representation. As a parallel process their independence dropped paving the way for MKP's political committee to declare that the trade unions must serve the party. The research question I examined under this chapter was (Q8) *whether participation could function in a genuine manner in an autocratic regime?*

When the crisis of political power caused industry management to become paralysed, workers again took charge of direction during the 1956 revolutionary events. The workers councils established in October 1956 played a special role among the fast changing conditions. As opposed to the 1945 shop committee movement, this time the election of the enterprise level organisations was followed by units of a higher level: workers councils were at district, and city level, but even at the counties. An important point in the organisation of workers councils was the convocation of the workers councils' parliament with the participation of the delegates of major factories. The parliament accepted the basic principles of the workers councils' rights and operation regulating the relationship of workers, workers councils, the director, and the state. Workers councils could not, therefore, be regarded the continuation of the trade union movement, but are the outcome of a new grass-root initiative. The multiple layer of organisation again showed similarities with the planned structure of the Weimar works councils.

The government attempted to separate workers councils and so called revolutionary councils, and tried to handle them by different legal means. Seeing the commencement of the work of central as well as local units, a government decree acknowledged the newly established grass-root organisations named revolutionary committees. Few days later however, the dissolution of revolutionary committees was ordered. 'Cleansing' was once again ordered by the Party. They did their best to discredit those dismissed, and branded them as counter-revolutionists. These measures clearly disintegrated the factory collective, and increased the workers' reluctance to openly support the workers councils. At the same time, the government, quoting economic difficulties, returned to the previous methods of central administration, and arrests meanwhile also began to target the members of the factory workers

councils. Hungarian Socialist Workers' Party (MSZMP) regulated the party policy regarding workers councils, which, naturally, equalled the implementation of the party's leading role. The official ideology claimed that in a socialist state there is no justified need for the independent protection of workers' interests. In connection with that statement was the state's ownership, and its role as a unifier of social interest, and the financial management in a plan economy framework. [947] That, at the same time, also foreshadowed that trade union committees could not take over the rights of the workers' councils.

A further barrier to genuine participation was that the lawmaker tried to make works councils fit to the traditional framework of the management of state-owned companies. Theoretically it was the works councils' duty to involve through their activity the workers of the factory in the financial management of companies, in the control of production, in promoting the realisation of the plan economy, and the consolidation of the workers' ownership of state companies. At the same time it was also expressed immediately that the shaping and operation of works councils must not affect the company director's sole responsibility. The system of the plan economy narrowed their right of consultation to an even smaller area.

A further limitation came from the fact that the resolution ordered to settle issues not regulated in the resolution along the principles of 'democratic centralism', and 'mutual socialist cooperation'. But the principle of democratic centralism required that the company's well-founded, that is legitimate interests had to be ranked above those of the workers, and social interest as provided by legislation superseded that of the enterprise, or even the workers. That principle was followed also within the trade union through the fact that the lower ranking trade union organ was obliged to execute the resolutions of the higher ranking organ.[948]

There was no point for subscribers to the central ideology to advocate that common social interest would eventually enable the creation of common corporate and individual interest, and that there is no need for instruments of public law to guarantee work peace because "*cooperation of comrades, and mutual socialist assistance are an objective necessity even if occasionally the opposite happens*", therefore, in a socialist establishment the work collective is held together by a harmony of objectively implemented and implementable interests.[949] In reality, the 'harmony of interests' was usually achieved to the detriment of workers.

Given the fact that the living and working conditions of workers showed no apparent improvement, the effort of works councils were hardly noticeable to workers. Moreover, the role of the works councils operating on shop floor level, and under the auspices of the trade union, workers could hardly differentiate between the trade union and works councils. The distinction was made even more difficult by the rules applicable to the election and composition of the works councils. Its composition was subject to the requirement that 'there should be a sufficient number of trade union officers to guarantee the cooperation of the trade union and the works council work, and that to also ensure that the 'key figures of the communist system should participate', ie, 'people with the appropriate sense of political

[947] Beránné-Kajári (1992:99)
[948] Weltner (1961:478)
[949] Weltner (1961:72)

identity'.[950] This, on the one hand, further increased the party's control, and, on the other, it was sufficiently murky to ensure large enough grounds for political screening as the law provided no specific reason to recall a party functionary, while incompatibility had to be stated concerning all political, economic, and other activities, and behaviours that were against the interests of the working people.

The new Labour Code of 1967 set forth that the purpose of the Act is to regulate how workers could contribute to, in accordance with the provisions of the Constitution (Act No XX of 1949) and through channels of the trade union, the regulation of work and living conditions and how they could facilitate the improvement of the productivity of an enterprise and control its activity. The basic concept of the Labour Code was to enhance indirect participation through trade unions and leave a narrow space for direct involvement. However, the overall leeway of the Labour Code was not so significant. Trade unions were seemingly given an important role, but the structure and nature of participation was rather limited in reality due to the all-encompassing presence of the Party. After the launching of the new economic mechanism in 1968 soon it became apparent that the economic reforms were not sustainable without political changes. The economic independence of enterprises would have required directors to be appointed based on objective criteria regarding leadership and management skill and workers should have had a word in the selection process.

However, the envisaged economic reorganization called for political pluralism, similar to the concept which had been initiated by Imre Nagy and to what was demanded during the 1956 revolution. To maintain the 'soft dictatorship', there was no other possibility than to bring the whole economic reform program to an end. Thus, re-centralization eventually overshadowed the enterprises' self-government regarding participation. The regulatory scope of code of conducts was further curtailed by the obligation of directors to consult and seek agreement with the enterprise level trade union unit and KISZ, organizations which were not at all independents from party politics. New regulations concerning participation provided that production committees were entitled to inquire information on production plans and goals and to articulate their opinion only on the *execution* of these plans. While forums of indirect participation were entirely brought under the umbrella of trade union movement, the Party's influence on direct participation was increased.[951] These measures indeed did not bring workers closer to the idea of workplace democracy.

An empirical research completed by Lajos Héthy and Csaba Makó found that a significant percentage of workers thought that their participation in the socialist workers movement was merely part of their tactic to achieve higher wages, and all they wanted was to ensure 'ideological coverage' for themselves. The inappropriate working of workplace democracy hindered the workers' ability to identify with the company's mission. Interviews with workers suggest that the production was a remarkably formal institution. At the same time the socialist brigade movement, similarly to the operation of other institutions of workplace democracy drowned in its own formality, and/or became the cover institution of implementing individual interests." Workers could not have a say in the decision making

[950] Weltner (1961:578-673)

[951] MSZMP Political Committee's Decision on the independence of trade union activity of May 10, 1966; see, MSZMP határozatok és dokumentumok 1963-1966 [Documents and Decisions of MSZMP 1963-1966] (Budapest, 1968, Kossuth Kiadó), 288.

process by means of the formal pathways created for them. Thus participation in reality was transferred to informal channels.

Again, the Party's all-encompassing nature was emphasised; it was argued that the Party, considering the interest of the working class and the entirety of the society, has to formulate the economic and social goals and must lead the society in unity to achieve these goals, without which socialist development has not been possible. Participation was envisaged as a tool to serve this unity by meeting production goals, overcoming technical challenges and strengthening diligence at workplaces.[952] It was decided that the impetus on democracy had to be given in line with the principles of democratic centralism.[953]As the Party had effective control over all aspects of the society, it was understood that its influence on fostering workplace democracy would also be prevailing – as it was described in the Party's decrees.[954]

The importance of employee involvement – direct or indirect – in enterprises' economic activity was unquestioned; however, its actual impact if it is treated solely as an economic tool is doubtful. Participation does not appear either in the state socialist Hungarian regime or in Japan as a human right.

V Final Conclusion

To prove the third hypothesis (H3) PARTICIPATION IS SUBJECT TO SIMULTANEOUS RECOGNITION OF INDIVIDUAL FREEDOM AND THE FORCE OF SOCIAL INFLUENCES ON THE EXTENT AND REACH OF INDIVIDUAL FREEDOM, I drew conclusions from the fourth part of the dissertation concerning non-democratic participation models. I found that the right to information and consultation is an individual right, in a sense that it should be enjoyed unconditionally by every employee.[955] Therefore, it is not possible to have genuine participation in regimes which deny the existence or even question the importance of individual freedom.

There are many similarities between the Japanese and the state-socialist model of participation. First, both system emphasise the importance of group harmony over individual interest and practically deny the reason of existence of the latter. Thus, they regard participation as tool which helps people understand the group interest and execute plans or orders which are considered to serve such interest at best. Group interest could be the interest of a brigade, a shop, a company or a collective, a party, the socialist community itself. In both

---

[952] L Héthy 'Az üzemi demokrácia és a munkások' [Workplace democracy and workers] (Budapest, 1980, Kossuth Kiadó), 218.

[953] *A Magyar Szocialista Munkáspárt XI. kongresszusának jegyzőkönyve* [Minutes of the 11th Congress of Hungarian Socialist Workers' Party] (Budapest, 1975, Kossuth Kiadó), 467, 500.

[954] Az üzemi demokrácia néhány elvi kérdése. Az MSZMP határozatai és dokumentumai 1967-1970 [On some of the theoretical issues of workplace democracy. Decrees and documents of MSZMP, 1967-1970], 384.

[955] E Ales 'Information and Consultation within the undertaking' *in Recasting Worker Involvement? Recent trends in information, consultation and co-determination or worker representatives in a Europeanized Arena*' (Kluwer, 2009) 13. Similarly, Otto Kahn-Freund argued that the right to strike is an individual right; see, O Kahn-Freund '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe), 5 ff.

systems the top-down operation and decision-making methods made workers feel somewhat betrayed. As a reaction, workers oppose mostly passively by ignoring the participation forums and by leveraging on informal channels. Reforms created to enhance activity and therefore increase productivity were stopped halfway, when it became apparent that the recognition of individual freedom and interest would be necessary alongside the newly created or renewed instruments of participation.

Thus, it is not enough if a system is devoted to group- or collective-oriented rights, what matters is the simultaneous recognition of individual freedom and to the force of social influences on the extent and reach of individual freedom.[956] As the examples of Japan and state-socialist Hungary demonstrates, it does not make substantial difference regarding the results, whether the denial is rooted in feudal patterns or a consequence of all-encompassing Party politics, there is no substitute for individual freedom – and individual responsibility either. As Sen argues, any affirmation of social responsibility that replaces individual responsibility is counterproductive.

The success of the European model of participation lies in two interconnected factors. One is the notion of participation that encompasses employee involvement as a human right and as a tool for economic efficiency. Two is that participation has a solid foundation based on principles of democracy. Acknowledging participation as a human right is a guarantee that the person is not treated as subject, as 'serf', but a person with human dignity who has a say in decisions made on matters affecting her life. Participation at workplace helps to fight commodification and objectification of human beings. More specifically, employee involvement at workplaces is an important tool in employees' hand to balance the superior economic power of employers. Through the democratization of decision making at the workplace freedom could be brought to employees and therefore they could be eased from subordination in employment relations. While businesses are required to respect their employees' right to get involved in decision-making processes and employees need to learn how to leverage their participatory rights, it is the state's responsibility to create enforceable legal norms and promote economic democracy.

Only democracy can create an environment that fosters the substantive freedom of people to lead lives which they have reason to value, that enhances the real choices they have, and that thereby promotes social justice. Observations Sinzheimer and Sen made on the importance of democracy have to be remembered here. Protection of the human dignity of employees has essential importance to society, as the working power of man is not only an individual but also a social asset. The right to employee involvement has to remain protected and be promoted not only as tool to enhance economic competitiveness but also as a fundamental right. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of the humanity of workers through involvement ought to be seen as a shared responsibility of global economic actors.

---

[956] R C Grady, 'Workplace Democracy and Possessive Individualism' (1990) 52 The Journal of Poltics, 1; contrary to this: S L Schweizer 'Participation, Workplace Democracy, and the Problem of Representative Government' (1995) 27 Polity 3.

APPENDICES

Archive Documents

PIL 274. f. 20/1. ő. e.

PIL 274. f. 20/21. ő.e.

PIL 274. f. 20/30. ő. e.

PIL 274 f. 20/32. ő. e.

PIL 274. f. 20/33. ő. e.

PIL 274. f. 20/40 ő. e.

PIL 288. f.5 /41

SZKL 1. F. 6/758. ő. e.

SZKL 1-2./94 ő. e.

SZKL 1-2/88. ő. e.

SZKL 1-3/333. ő. e.

SZKL 1-4/396 ő. e.

UMFI Hungarian newsreel 33

Broadcast of Kossuth Radio on October 26, 1956; see, A forradalom hangjai at http://www.radio.hu/index.php?option=com_content&task=view&id=374&Itemid=131&mode=1&date=1956.11.01

Népszabadság, January 1, 1967.

Népszabadság, October 11, 1967

A Magyar Szocialista Munkáspárt IX. kongresszusának jegyzőkönyve [Minutes of the 9th Congress of Hungarian Socialist Workers' Party] (Budapest, 1967, Kossuth Kiadó)

A Magyar Szocialista Munkáspárt XI. kongresszusának jegyzőkönyve [Minutes of the 11th Congress of Hungarian Socialist Workers' Party] (Budapest, 1975, Kossuth Kiadó)

Az MSZMP határozatai és dokumentumok 1963-1966 [Documents and Decisions of Hungarian Socialist Workers' Party 1963-1966] (Budapest, 1968, Kossuth Kiadó)

Az MSZMP határozatai és dokumentumai 1967-1970 [On some of the theoretical issues of workplace democracy. Decrees and documents of MSZMP, 1967-1970]

'A SZOT teljes ülésének határozatai, 1949. február 22. A magyar szakszervezeti mozgalom válogatott dokumentumai II. k. (SZOT Központi Iskola kiadása, d.n.)

Table of Cases

Court of Justice of the European Union

Air Transport Association of America v Sec of State for Energy and Climate Change (Case C-366/10) [2011] ECR I-13755

Confédération générale du travail (CGT) and Others C-385/05 [2007] ECR I-611

Federation francaise des societies d'assurance case C-244/94 [1995] ECR I-401

Gottrup-Klim Grovvareforening v Dansk Landbrugs Grovvareselskab AmbA (DLG) (Case C-250/92) [1994] ECR 1-5641

Grongaard and Bang C-384/02 [2005] ECR I-9939

Hofner and Elser v Macroton C-41/90 [1991] ECR I-1979

International Transport Workers' Federation and The Finnish Seamen's Union C-438/05 [2007] ECR I-

Hauptzollamt Mainz v Kupferberg C-104/81 [1982] ECR 3641

Kramer, Cornelius, and others, Joined Cases 3,4 and 6/76 [1976] ECR 1279

Laval un Partneri Ltv v Svenska Byggnadsabetareförbundet C-341/05 [2007] ECR I-11767

Portugal v Council C-149/96 [1999] ECR I8395

Opinion 1/78 (Re Natural Rubber Agreement) [1979] ECR 2871

Council of Europe

General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece, Complaint No. 65/2011

National Courts

Japan

Koketsu Chugoku Shisha case (Supr. Ct. 1st Petty Bench, Feb 28, 1974, 28 Civ. Cases 66)

Kansai Denryoku, Supr. Ct. 1st Petty Bench, Sept. 16, 1983, 1094 Judgments 121

Nihon Kokan case (Supr. Ct. 2nd Petty Bench, Mar. 15, 1974, 28 Civil Cases 265)

Hungary

8/1990 (IV.23.) ABH (Constitutional Court decision).

Supreme Court Decision No BH 2013.79

Curia Decision No EBH2014. M.13.

Ruling of the Municipal Labour Court No 2.Mpk. 50.329/2005/9-I.

BIBLIOGRAPHY

1 ADAIR, J D '*The Hawthorne effect: A reconsideration of the methodological artifact'* (1984) Journal of Applied Psychology

2 ALCHIAN, A A '*Uncertainty, Evolution and Economic Theory'* (1950) 58 J Poll. Econ. 211

3 ALES, E '*Information and Consultation within the Undertaking: Employees' Right or Employer's Duty? Looking for effectiveness*' in Blanke et al (eds) (2002).

4 ALEXY, A '*Theory of Constitutional Rights'* Oxford, 2002, OUP)

5 ALSTON, P (ed.) *'Labour Rights as Human Rights'* (OUP, 2005)

6 ARAKI, T '*The Relationship between State Law, Collective Agreement and Individual Contract: Japan's Decentralized Industrial Relations with the Internal Market Oriented Flexicurity*' at http://mta-pte.ajk.pte.hu/downloads/Takashi_Araki_Relationship_between_Law_CBA_Contract_in_Japan.pdf Retrieved on 10 February 2013

7 ARAKI, T '*Labour and Employment Law in Japan'* (Tokyo, 2002, JILPT),

8 ARAKI, T '*The Japanese Model of Employee Representational Participation'* (1993-1994) 15 Comp. Lab. L.J.

9 ARGYLIS, C '*Understanding organizational behavior*' (Tavistock, 1960)

10 ARIELY, D, KAMENICA, E AND PRALEC, D '*Man's search for meaning: The case of Legos*' (2008) 67 Journal of Economic Behavior and Organization, 671-77.

11 ARRIGO, G AND CASALE, G (eds) *'A comparative overview of terms and notions on employee participation*' ILO Working Paper No 8, (Geneva, 2010)

12 BAI, G '*Japan's Economic Dilemma: The Institutional Origins of Prosperity and Stagnation*' (New York & Cambridge. 2001, Cambridge University Press)

13 BAILEY, S K, TRUMAN, D B, BURNS, A E, *'Research Frontiers in Politics and Government'* (1955) Brookings Lectures, 123 Science, 3200, 745-746.

14 BAKER, D *'The Trade Union Movement in Japan'* (1965-66) 23 International Socialism, 19-26.

15 BARNARD, C European Labour Law (Oxford, 2012) Oxford University Press

16 BEBCHUK, L A AND ROE, M J '*A Theory of Path Dependency in Corporate Ownership and Governance*' (1999) Columbia Law School, Working Paper Series No 131

17 BECKER, G '*Human Capital'* (University of Chicago Press, 1964)

18 BEER, L W '*Postwar Law on Civil Liberties in Japan'* (1983) 2 UCLA Pac. Basin L.J. 98

19 BEER, L W AND WEERAMANTRY, C G '*Human Rights in Japan: Some Protections and Problems'* (1979) 1 Universal Human Rights 3

20 BENYÓ, B '*Tekinthetjük-e jelentéktelennek a munkavállalók részvételét Magyarországon'* (2003) 47 Munkaügyi Szemle 1-2

21 BERÁNNÉ NEMES, E AND KAJÁRI, E '*A munkástanácsok és a szakszervezetek (1956-1957)*'(1992) 2-3 Múltunk

22 BERCUSSON, B (ed) '*European labour law and the EU Charter of Fundamental Rights'* (Brussels, 2002, ETUI)

23 BERCUSSON, B '*The European Social Model Comes to Britain'* (2002) ILJ 209-44

24 BERLE, A A AND MEANS, G C '*The Modern Corporation and Private Property'* 2nd edn (New York, 1967, Harcourt, Brace and World) (originally published in1932)

25 BIAGI, M '*Forms of Employee Representation at the Workplace*' in R. Balnpain (ed) 'Comparative Labour Law and Industrial Relations in Industrialized Market Economies' (6th ed, 1998)

26 BIAGI, M AND TIRABOSCHI, M '*Forms of Employee Representational Participation*' in Blanpain, R (ed) (2007)

27 BLACK, S. E. AND LYNCH, L. M. '*What's driving the new economy?:The benefits of workplace innovation.*' (2004) 114The Economic Journal

28 BLAIR, M M '*Firm-specific Human Capital and Theories of Firm'* (1999) Georgetown University Law Center, Business, Economics and Regulatory Policy, Working Paper No 167848

29 BLANKE, T '*Workers' right to information and consultation within the undertaking'* in Bercussion, B (ed) (2002)

30 BLANKE, T, ROSE, E, VOOGSGEERD, H AND ZONDAG, W (eds) '*Recasting Worker Inovelevment? Recent trends in informaiton, consultation and co-determintaion of worker representatives in a Europenized Area*' (Groningen, 2009, Kluwer)

31 BLANPAIN, R '*Representation of employees at plant and enterprise level'* (1994, Martinus Nijhoff)

32 BLANPAIN, R (ed) '*Comparative Labour Law and Industrial Relations in Industrialized Market Economies'* (9th and revised edition) (The Netherlands, 2007, Kluwer Law International)

33 BLUMBERG, P '*Industrial democracy: The sociology of participation'* (London: Constable, 1968)

34 BOGG, A AND NOVITZ, T '*Investigating Voice at Work'* (2011-2012) 33 Comparative Labour Law and Policy Journal

35 BOYD, R AND RICHARDSON, P J '*Culture and the Evolutionary Process'* (Univeristy of Chicago Press, 1985)

36 BRONSTEIN, A '*En aval, des normes international du travail: le role de l'OIT dans l'elabortion et la revision de la legislation du travail*' in Javillier, J C, Geringon, B (eds) (1999) 219-49

37 BROWN, M AND CREGAN, C '*Organizational Change Cyinicism: The Role of Employee Involvement*' (2008) 47 Human Resource Management 4, 667-86

38 CAPRIO, M E AND SUGITA, Y '*Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society'* (Taylor and Francis, 2007)

39 CARABELLI, U AND SCIARRA, S (eds.) '*New Patterns of Collective Labour Law in Central Europe. Czech and Slovak Republics, Hungary, Poland'* (Milano, 1996, Giuffre Editore)

40 CASALE, G '*Experiences of tripartite relations in Central and Eastern European Countries'* (2000) 16/2 The International Journal of Comparative Labour Law and Industrial Relations

41 CASALE, G '*Globalisation, Labour Law and Industrial Relation: Some Reflections*' 55 Bulletin of Comparative Labour Law'

42 CASALE, G, TENKORANG, J '*Public service labour relations: A comparative overview'* Paper No 17' (Geneva, 2008, ILO)

43 CAVALLINI, M., ROYLE, T., CAIRNES, J.E, SENATORI, L. '*European Works Councils: an effective mechanism for workers' participation? A case study from the banking sector'* First Author Other Authors Abstract, 13

44 CHAN J '*Gender and Human Rights Policies in Japan*' (Stanford University Press, 2004)

45 CLUWAERT, S, SCHÖMANN, I '*European social dialogue and transnational framework agreements as a response to crisis*?' (2011) 4 ETUI Policy Brief

46 CLUWAERT, S, SCHÖMANN, I AND WARNECK, W '*The European interprofessional and sectoral social dialogues and the economic crisis*' in Benchmarking Working Europe 2010 (Brussels, 2010, ETUI)

47 COLE, R 'Some Principles Concerning Union Involvement in Quality Circles and Other Employee Involvement Programs' (2001) Labour Studies Journal / Winter 1984

48 COLE, T '*The Role of the Labor Courts in Western Germany'* (1956) 18 The Journal of Politics, 479-498

49 COMPA, L A AND DIAMOND, S F (eds) '*Human Rights, Labor Rights and International Trade'* (University of Pennsylvania Press, 2003)

50 COUTU, M '*With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labour Law'* (2012-2013) 34 Comp. Lab. L& Pol'y J

51 COYNE, C J '*After War: The Political Economy of Exporting Democracy'* (Stanford University Press, 2008)

52 CRAMPTON, R J '*Eastern Europe in the twentieth century and after'* (1997, Routledge)

53 DAHL, R '*Preface to Economic Democracy'* (University of California Press, 1985)

54 DAVIDOV, G AND LANGILLE, B (eds) '*The Idea of Labour Law'* (Oxford, 2011, OUP)

55 DAVIES, P '*European Community labour law: principles and perspectives: liber amicorum Lord Wedderburn of Charlton* (Oxford University Press,1996)

56 DEAKIN, S '*Evolution of our Time: A Theory of Legal Memetics'* (2002) University of Cambridge, Working Paper No. 242

57 DELEREUX, T '*The European Union in international environmental negotiation: a legal perspective on the internal decision-making process'* (2006) 6 Int Environ Agreements

58 DENIS, L (ed) *Kant's Metaphysics of morals: a critical guide* (Cambridge, 2010, CUP)

59 DIAMOND, M.A. AND ALLCORN, S. '*Surfacing perversions of democracy in the workplace: A contemporary psychoanalytic project*' (2006) Psychoanalysis, Culture & Society

60 DORSSEMONT, F AND BLANKE, T (eds) *'The Recast of the European Works Council Directive'*(Antwerp, 2009, Intersentia)

61 DUKES, R. *The Labour Constitution: The Enduring Idea of Labour Law (*Oxford, 2014, OUP)

62 DUKES, R '*Hugo Sinzheimer and Constitutional Function of Labour Law'* in Davidov, G and Langille, B (eds) (2011)

63 DUKES, R '*Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the role of Labour Law*' (2008) 35 Journal of Law and Socielty 3

64 DWORKIN, R '*The Partnership Conception of Democracy'* (1998) 86 Cal. L. Rev.

65 FAMA, E F AND JENSEN, M C '*Separation of Ownership and Control'* (1983) 26 Journal of Law and Economics 2

66 FERBER, K, *A siker ára*, 2nd Edition (Budapest, 2014, Syllabux)

67 FERBER, K *'A másság szigetein'* [On the Islands of Differences]' (2012, Oriold)

68 FESTING, M, GROENING, Y, KABST, R AND WEBER, W '*Financial participation and performance in Europe'* 15 Human Resource Management Journal, 54–67

69 FISHER, P '*Works Councils in Germany'* (1951) Visiting Expert Series No 18, Office of the United States High Commissioner for Germany

70 FRAENKEL, E 'Die politische Bedeutung des Arbeitsrechts' in T Ramm (ed) *Arbeitsrecht und Politik: Quellentexte 1918-1933* (Neuwied am Rhein 1966)

71 FRANKE, R H AND KAUL, J D '*The Hawthorne experiments: First statistical interpretation'* (1978) American Sociological Review

72 FREEMAN, R B AND LAZEAR, E P '*An Economic Analysis of Works Councils*' in Works Councils: Consultation, Representation, and Cooperation in Industrial Relations

73 FREGE, C AND TÓTH, A '*If You are Hunted, You Haven't Time to Enjoy the Landscape Paper for the IV'* (European Regional Congress of the Industrial Relations Associations. Dublin, 1997)

74 FRITZSCHE, P '*Did Weimar Fail?*' (1996) 68 The Journal of Modern History 3

75 FUKUSHIMA, G S '*Corporate Power'* (1989) in Ishida, T and Krauss, E S (eds) 'Democracy in Japan' (University of Pittsburgh Press, 1989)

76 GERINGON, J C (ed) '*Les norms internationals du travail: un patrimonies pour l'avenir: Melanges en l'honneur de Nicolas Valticos'* (Geneva, 1999, ILO)

77 GIERKE, O '*Die Genossenschaftstheorie und die deutsche Rechtsprechung*' (Berlin, 1887)

78 GLASNER, V AND GALGÓCZY, B '*Plant-level responses to the economic crisis in Europe'* (ETUI-REHS, 2009)

79 GOLDSTEIN, S G '*Organizational Dualism and Quality Circles'* (1985) 10 Academy of Management Review 3

80 GOODMAN, R AND NEARY, I (eds) '*Case Studies on Human Rights in Japan'* (Routlegde, 2013)

81 GRADY, R C '*Workplace Democracy and Possessive Individualism'* (1990) 52 The Journal of Poltics, 1, 146-66.

82 GUARDIANCICH, I (ed) '*Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia'* (ILO (EC), 2010)

83 GYULAVÁRI, T AND KUN, A '*Munkáltatói jogalkotás? A munkáltatói szabályzatok szerepe a munkajogi szabályozásban'* (2012) 3 Magyar Jog, 157-69

84 HAGELMAYER, I '*A kollektív szerződés alapkérdései'* [Fundamentals of Collective Agreements] (Budapest, 1979, Akadémiai Kiadó)

85 HAJDÚ, J. '*A japán munkaügyi kapcsolatok sajátosságai a kezdetektől 1995-ig'* (Szeged, 2006, Pólay Elemér Alapítvány)

86 HANAMI, T AND FUMITO, K, *Labour Law in Japan* (2011, Kluwer Law)

87 HANAMI, T '*Industrial Democracy'* (1989) in Ishida, T and Krauss, E S (eds) 'Democracy in Japan' (University of Pittsburgh Press, 1989)

88 HANAMI, T, *Labour Relations in Japan* Today (Tokyo, 1976, Kodansha International)

89 HANNAH, L '*Inventing Retirement: The Development of Occupational Pensions in Britain'* (CUP 1986)

90 HANSMANN, H AND KRAAKMAN, R '*The End of History of Corporate Law'* (2001) 89 Georgetown Law Journal 439

91 HAQUE, M.S. '*Threats to workplace democracy'* (2000) 2 Peace Review 12

92 HARASZTI, M '*Beszélő évek – 1969'* (1998) Beszélő

93 HARRISON, J.S. and Freeman, R.E. '*Democracy in and around organizations: Is organizational democracy worth the effort?*' (2004) Academy of Management Executive

94 HARVEY, D '*The Enigma of Capital and the Crises of Capitalism'* (Oxford, 2010, Oxford University Press)

95 HELOU, A '*The Nature and Competitiveness of Japan's Keiretsu'* (1991) 25 J. World Trade 99

96 HEPPLE, B '*Labour Laws and Global Trade'* (Hart Publishing, 2005)

97 HERMANN, W AND JACOBI, O '*Ambassadors of the European Civil Society: Practice and Future of European Works Councils*' in Hoffmann et al (eds) (2000)

98 HÉTHY, L '*Az üzemi demokrácia és a munkások'* [Workplace democracy and workers] (Budapest, 1980, Kossuth Kiadó)

99 HÉTHY L AND MAKÓ, CS '*Munkásmagatartások és a gazdasági szervezet'* (Budapest, 1972 Akadémiai Kiadó)

100 HIRSCHEIME, J AND YUI, T, '*The Development of Japanese Business*' (Allen and Unwin, London, 1981).

101 HOFFMANN, R, JACOBI, O, KELLER, B AND WEISS, M (eds) '*Transnational Industrial Relations in Europe*' (Hans Böckler Stiftung, 2000)

102 HOLLÓ, A '*Állampolgári jogok Magyarországon*' [Citizens' Rights in Hungary] (Budapest, 1979 Kossuth Kiadó)

103 HOLMSTROM, B AND MILGROM, P '*The Firm as an Incentive System'* (1994) 84 The American Economic Review 4

104 HORVÁTH, I AND RÁCZ, R (eds) '*Tanulmányok a munkajog jövőjéről'* (Budapest, 2004, Denzoprint)

105 HÖFFE, O '*Kant's innate right as a rational criterion for Human Rights*' in L Denis (ed) Kant's Metaphysics of morals: a critical guide (Cambridge, 2010, CUP)

106 HUNGLER, S '*Recent Changes and Challenges Regarding Employees' Participation Rights in Japan'* (2011) Jogi Tanulmányok, ELTE, Faculty of Law and Political Sciences

107 ISHIDA, T AND KRAUSS, E S (eds) '*Democracy in Japan'* (University of Pittsburgh Press, 1989)

108 ILO Studies Series B No 6.

109 JENSEN, M C AND MECKLING, W H '*Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure'* (1976) Journal of Financial Economics, October

110 JONES, S R G '*Was there a Hawthorne effect*?' (1992) American Journal of Sociology

111 KÁDÁR, J, *'Hazafiság és internacionalizmus'* [Patriotism and Internationalism] (Budapest, 1968, Kossuth Kiadó)

112 KAHAN, M AND KLAUSNER, M '*Path Dependnce in Corporate Contracting: Increasing Returns, Herd Behavious and Cognitive Biases'* (1996) 74 Washington University Law Quarterly 347

113 KAHN-FREUND, O '*Industrial Democracy*' (1977) 6 Industrial Law Journal, 65-84

114 KAHN-FREUND, O '*Labour Relations: Heritage and Adjustment'* (Oxford University Press, 1979)

115 KAHN-FREUND, O '*The Labour and the Law*' Hamlyn Lectures Series' (Stevens and Sons, 1972)

116 KAHN-FREUND, O '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe)

117 KAHN-FREUND, O '*Trade Union Democracy and the Law'* (1961) 22 Ohio St. L.J. 4-5

118 KALMI, P, PENDLETON, A AND POUTSMA, E '*The Relationship between Financial Participation and Other Forms of Employee Participation: New Survey Evidence from Europe*' (2006) 27 Economic and Industrial Democracy, 637-667

119 KANDEL, E AND LAZEAR, E P '*Peer Pressure and Partnerships, Journal of Political Economy'* (1992) 100 Journal of Political Economy 4, 801-17

120 KARDKOVÁCS, K (ed), *Az új munka törvénykönyvének magyarázata* [Commentary on the New Labour Code] (Budapest, 2012, HVG-ORAC)

121 KÁRTYÁS, G '*Irányelv-tervezet a munkaerő-kölcsönzésről'* (2008) 4 Munkajog – Kérdések és Válaszok

122 KENDE, P (ed) 9-10 *Magyar Füzetek* (Paris, 1981, Dialogues Européens)

123 KERSHAW, D '*No End in Sight for the History of Corporate Law: The Case of Employee Participation in Corporate Governance'* (2002) 2 Journal of Corporate Law Studies 34

124 KESSLER, A S AND LULFESMANN, C '*The Theory of Human Capital Revisited: On the Interaction of General and Specific Investments'* (2002) CESifo Working Paper No.776

125 KISGYÖRGY S, PATAKY P, VÁMOS L. *'Helyzetkép az üzemi tanácsokról'* (Budapest, 2003, FES)

126 KISGYÖRGY, S AND VÁMOS, L '*Az üzemi tanácsok választásának és működésének tapasztalatai*' (script) (ÉT-PHARE Szociális Dialógus Program, 1994, Budapest)

127 KISS, GY '*A munkajogi szabályozás szerekezete és jellege, a kollektív szerződés rendeltetése és hatása a munkajog jogforrási rendszerében'* in Horváth, I and Rácz, R (eds) 'Tanulmányok a munkajog jövőjéről' (Budapest, 2004, Denzoprint)

128 KISS, GY '*Munkajog'* [Labour Law] (Budapest, 2005, Osiris)

129 KISS, GY, BERKE, GY, BANKÓ Z AND KAJTÁR, E *'A munka Törvénykönyve hatása a gazdasági versenyképességre'* (as a part of TAMOP 2.5.2 program, 'A partnerség és a párbeszéd szakmai hátterének megerősítése, közös kezdeményezések támogatása', Pécs, 2010), 211 ff.

130 KLUGE, N AND WILKE, P '*Board-level participation and workers' financial participation in Europe - State of the art and development trends*' (2007) European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS)

131 KOLBEN, K, '*Labour Rights are Human Rights*?' (2010) 50 Virginia Journal of International Law 2

132 KOLLONAY LEHOCZKY, CS (ed) '*A Magyar munkajog II'* [Hungarian Labour Law II] (Budapest, Kulturtrade)

133 KOLLONAY LEHOCZKY, CS '*Alanyok és viszonyok a vállalaton belül'* [Subjects and relations within an enterprise] (Budapest, 1990, KJK) 165-204

134 KOLLONAY LEHOCZKY, CS '*Kérdőjelek egy vegyes származású újszülött vonásai felett*' in Kun, A (ed) (2013)

135 KOLLONAY LEHOCZKY, CS '*Some Aspects of the Internal Management and Labour Relationsof Socialist State Enterprise'* (1982) 10 International Business Lawyer 14-15

136 KOLLONAY LEHOCZKY, CS '*The emergence of new forms of workers' participation in Central and East European countries*' in Markey, R and Monat, J (eds) (1997)

137 KOLLONAY LEHOCZKY, CS '*The Evolution of Labour Law in the New Member States of the European Union: 1995-2005*' Country Study on Hungary No Vt/2005/82, 6 and 22

138 KOLLONAY LEHOCZKY, CS '*The Fundamental Right of Workers to Information and Consultation under the European Social Charter'* in Dorssemont and Blanke (eds) 'The Recast of the European Works Council Directive (Intersentia, 2010)

139 KOLLONAY LEHOCZKY, CS AND LADÓ, M '*Hungary*' in Carabelli, U and Sciarra, S (eds.) (1996)

140 KOSSAÏ, M, PIGET, P, '*Adoption of information and communication technology and firm profitability: Empirical evidence from Tunisian SMEs'* (2014), 25 The Journal of High Technology Management Research

141 KRAUSS, E AND ISHIDA,T, *Japanese Democracy* (Pittsburgh, 1989, University of Pittsburgh Press)

142 KUN, A '*The 'dual' representation of workers at the workplace level in Hungary'* (2009) Studia Iuridica Caroliensia IV, 89-113

143 KUN, A (ed) '*Az új Munka Törvénykönyve dilemmái című tudományos konferencia utókiadványa: KRE ÁJK, 2011. december 13'* (Budapest, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, 2013)

144 LADÓ, M AND TÓTH, F (eds) '*Helyzetkép az érdekegyeztetésről. 1990–1994*' (Érdekegyeztető Tanács Titkársága, 1996, Phare Társadalmi Párbeszéd Projekt: Budapest)

145 LADÓ, M AND TÓTH, F '*Üzemi tanács: munkaharc helyett munkabéke'* (1994) 11 Mozgó Világ, 19–33

146 LAZEAR, E P '*Firm-Specific Human Capital: A Skill-Weights Approach'* (2003) NBER Working Paper, Cambridge, No 9679

147 LEANA, C R '*Power Relinquishment Versus Power Sharing: Theoretical clarification and empirical comparison of delegation and participation'* (1987) 72 Journal of Applied Psychology

148 LEANA, C R AND G W FLORKOWSI '*Employee Involvement Programs: Integrating Psychological Theory and Management Practice'* (1992) 10 Research in Personnel and Human Resources Management

149 LEARY, V A '*The Paradox of Workers' Rights as Human Rights'* in Compa, L A and Diamond, S F (eds) (2003)

150 LOCKE, E AND SCHWEIGER, D M '*Participation in Decision Making: One More Look, Research and Organizational Behaviour*' (1979) 1 Greenwich Conn: JAI Press

151 LUX, J '*A magyar szakszervezet történetéből'* (Budapest, 2008 Friedrich Ebert Foundation)

152 MARKEY, R AND MONAT, J (eds) '*Innovation and Employee Participation Through Works Councils – International Case Studies*' (Avebury, 1997)

153 MAROSI, M '[*The management and Organization of Japanese Companies*]' (Közigazgatási és Jogi Könyvkiadó, Budapest, 1985)

154 MARSHALL, T H '*Citizenship and Social Class'* (Cambridge, 1950)

155 MARSLAND, S E *'Birth of the Japanese Labor Movement: Takano Fusataro and the Rodo Kumiai Kiseikai*' (University of Hawaii Press, 1989)

156 MARX–ENGELS ÖSSZES MŰVEI I. [Complete works of Marx and Engels Vol 1] (Budapest, 1957, Kossuth Kiadó)

157 MATSUNAGA, M, '*Development and Validation of an Employee Voice Strategy Scale Through Four Studies in Japan*' (2014) 53 Human Resource Management

158 MAX PLACK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

159 MAYER, R '*Robert Dahl and the Right to Workplace Democracy*' (Spring 2001) 63 The Review of Politics

160 MAYO, E '*The Human Problems of an Industrial Civilization'* (New York, 1933, Macmillan)

161 MCCORMACK, G AND SUGIMOTO, Y, *Democracy in Contemporary Japan* (Armonk, 1986, Sharpe)

162 MCGAUGHY, E '*Behavioural Economics and Labour Law'* (2014) 20 LSE Legal Studies Working Paper

163 MICHIE, J AND OUGHTON, C '*Employee Participation and Ownership Rights'* (2002) 2 Journal of Corporate Law Studies 34

164 MILL, J S '*Principles of Political Economy'* (7th edn 1990)

165 MISES, L V '*Socialism: An Economic and Sociological Analysis'* (Yale University Press, 1953)

166 MIYAJIMA, H '*The Performance Effects and Determinants of Corporate Governance Reform'* (2008) in Aoki, M, Jackson, G and Miyajima, H (eds) 'Corporate Governance in Japan'

167 MOMMSEN, H '*The rise and fall of Weimar democracy'* (UNC Press Books, 1998)

168 MÜLLER-JENTSCH, W 'GERMANY: FROM COLLECTIVE VOICE TO CO-MANAGEMENT; IN ROGERS, J AND STREECK, W (EDS) (1992), 53-78,

169 MÜLLER-JENTSCH, W AND LEVIS, N '*Industrial Democracy: From Representative Codetermination to Direct Participation'* (1995) 25 International Journal of Political Economy 3, 50-60

170 NAGY, L 'A *munkajogi szabályozás szerkezete és jellege, a kollektív szerződés szerepe*' in Horváth, I and Rácz, R (eds) (2004)

171 NAKANE, C '*Japanese Society'* (University of California Press, 1972)

172 NAPTHALI, F '*Wirtschaftsdemokratie. Ihr Wesen. Weg und Ziel*' (1928)

173 NEARY, I '*In Serach of Human Rights in Japan' in Goodman, R and Neary, I (eds) 'Case Studies on Human Rights in Japan'* (Routlegde, 2013)

174 NEMES BERÁNNÉ, É AND KAJÁRI, E, *'A szociáldemokrácia kérdése a szakszervezetekben'* (1948-1956) In: Múltunk 1990/3 (129-142)

175 NEUMANN, L '*Circumventing Trade Unions in Hungary: Old and New Channels in Wage Bargaining*' 3 European Journal of Industrial Relations 2, 183-202

176 NJOYA, W '*Employee Ownership and Efficiency: An Evolutionary Perspective'* (2004) Ind. Law J. Vol. 33. No 3

177 NUSSBAUM, M C '*Creating Capabilities'* (Cambridge, 2011, Harvard University Press)

178 OKUNISHI, Y '*Conditions of introducing seikashugi-based wage system*' in Labour Situation in Japan and Analysis, Detailed Exposition 2009/2010

179 OPINION OF THE EESC ON EMPLOYEE INVOLVEMENT AND PARTICIPATION AS A PILLAR OF SOUND BUSINESS MANAGEMENT AND BALANCED APPROACHES TO OVERCOMING THE CRISIS, SOC/470, Brussels, 20 March 2013

180 PEMPEL, T J '*Japanese Democracy and Political Culture: A Comparative Perspective'* (1992) 25 Political Science and Politics

181 PENDLETON, A, POUTSMA, E, BREWSTER C AND OMMEREN, J '*Employee share ownership and profit-sharing in the European Union: incidence, company characteristics, and union representation*' (2002) 8 European Review of Labour and Research 47-62

182 PETER, D H AND WILPERT, B '*Conceptual Dimensions and Boundaries of Participation in Organization: A Critical Evaluation'* (1978) 23 Administrative Sciences Quarterly, 1-40

183 PETERS, A, KOECHLIN, L, FENNER ZINKERNAGEL, G *'Non-state actors as standard setters: framing the issue in an interdisciplinary fashion'* (Cambridge, 2009, CUP)

184 PETŐ, I '*Beszélő évek – 1967*' (1998) Beszélő, available online at http://beszelo.c3.hu/cikkek/1967.

185 PRUGBERGER, T '*A kollektív munkajog intézményei, a munkavállalói érdekképviselet és participációs jogok tartalma, mechanizmusa és érvényesülése a jogharmonizációs jogalkotási követelmények tükrében'*, in Horváth, I and Rácz, R (eds) (2004)

186 PRUGBERGER, T, TOMÁNÉ SZABÓ, R AND TATÁR, I '*Az üzemi és közalkalmazotti tanács Nyugat-Európában és Magyarországon'* (Budapest, 1994, MOSZ)

187 RADNAY, J '*Munkajogunk helyzetéről'* (2010) 9-10 Gazdaság és Jog

188 REHNMAN, E '*Industrial Democracy and Industrial Management – A critical essay on the possible meanings and implications of industrial democracy'* (London, 1968, Tanistock)

189 ROE, M J *'Can Culture Constrain the Economic Model of Corporate Law?'* (2002) 69 Chicago Law Review 1251

190 ROE, M J '*Chaos and Evaluation in Law and Economics'* (1996) 109 Harward Law Review 641-68

191 ROGERS, J AND STREECK, W (EDS) '*WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS*' (UNIVERSITY OF CHICAGO PRESS, 1992)

192 ROMÁN, L '*A munkajog alapintézményei'* [Basic Instruments of Labour Law] (Pécs, 1998, University Press of Pécs)

193 RÜB, S *'World Works Councils and Other Forms of Global Employee Representation in Transnational Undertakings*' (Hans Böckler Stiftung, Arbeitspapier 55)

194 SADOWSKI, D, JUNKES, J AND LINDENTHAL, S '*The German Model of Corporate and Labour Governance*' (2000) 22 Comp. Lab. L. & Pol'y J, 33

195 SCHALBER, M '*The American Occupation of Japan: The Origins of the Cold War in Asia'* (OUP, 1985)

196 SCHIWOCHAU, S '*Employee Participation and Assessments of Support for Organizational Policy Changes*' (1997) Journal Of Labour Research, Vol. XVIII, No 3

197 SCHONBERGER, H B '*Aftermath of War: Americans and the Remaking of Japan 1945-1952*' (The Kent State University Press, 1989)

198 SCHÖMANN, I, CLAUWAERT, S AND WARNECK, W *'Information and consultation in the European Community*' Report 97 (Brussels, 2006,ETUI)

199 SCHREGELE, J '*Forms of participation in management'* (1976) 113 International Labour Review, 117-22

200 SCHULTEN, T '*European Works Council: Prospects for a New System of European Industrial Relations'* (1996)2 EIJR 7, 8

201 SCHWEICKART, D '*After Capitalism (New Critical Theory)'* (Rowman & Littlefield, 2002)

202 SCHWEIZER, S L '*Participation, Workplace Democracy, and the Problem of Representative Government*' (1995) 27 Polity 3, 359-77

203 SCIARRA, S '*Viking and Laval: Collective Labour Rights and Market Freedom in the Enlarged EU'* (2007-08) 10 Cambridge Yearbook of European Legal Studies

204 SEGOL, B, JEPSEN, M AND PECHET, P (eds) *Benchmarking Working Europe 2014* (ETUI-ETUC, 2014,)

205 SEN, A *'Freedom of Choice: Concept and Content'* (1988), 32 European Economic Review 2, 269-294.

206 SEN, A *'Commodities and Capabilities'* (New Delhi, 1999, OUP)

207 SEN, A '*Development as Freedom'* (Oxford, 1999, Oxford University Press)

208 SEN, A '*Az egyéni szabadság mint társadalmi elkötelezettség'* [Translation by Zsuzsa Ferge] (1992) 1 Esély, 2-17

209 SIMON, H A 'Recent *Advances in Organization Theory'*, in Bailey (ed) (1955)

210 SIMON, H A '*Theories of Decision-Making in Economics and Behavioral Science'* (1959) 49 The American Economic Review 3

211 SINZHEIMER, H '*Das Ratesystem'* (1919)

212 SINZHEIMER, H '*Das Wesen des Arbeitsrecht, in Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden'* (1976)

213 SINZHEIMER, H '*Eine Theorie des Sozialen Rechts' (1936) XIV Zeitschrift für öffentliches Recht'*

214 SINZHEIMER, H '*Grundzuge des Arbeitsrechts'* (1927)

215 SINZHEIMER, H '*The Development of Labour Legislation in Germany'* (1920) 92 Annals of the American Academy of Political and Social Science

216 SMITH, J W '*Economic Democracy: The Political Struggle for the 21st century'* (Radford, 2005, Institute for Economic Democracy Press)

217 STRASSENREITER, E '*The social democratic party in the political life of the country'* (1944 – 1948) in Múltunk 1990/3 (114-128)

218 SUGENO, K '*Japanese Employment and Labor Law'* (Carolina Academic Press, 2002)

219 SUGENO, K, *Japanese Labour Law* (Tokyo, 1992, Tokyo University Press)

220 SUNSTEIN, C R *'Human Behavior and the Law of Work'* (2001) 87(2) Virginia Law Review

221 TAKEMAE, E '*The Allied Occupation of Japan'* (Continuum International Publishing Group, 2003)

222 TATSUMICHI, S AND MORISHIMA, M '*Seikashugi from an Employee Perspective'* (2007) Japanese Labour Review Vol. 4. No. 2. Spring 2007; eforum.jil.go.jp (withdrawn on February 10, 2013)

223 TAYLOR, F W '*The Principles of Scientific Management'* (1911)

224 THALER, R AND SUNSTEIN, C '*Nudge: Improving Decisions about Health, Wealth and Happiness'* (New Haven, 2008, Yale University Press)

225 TÓTH ,E ZS '*Kádár leányai – Nők a szocializmus időszakában'* [Daughters of Kádár – Women in the socialist era] (Budapest, 2010, Nyitott Műhely)

226 TÓTH, A 'NEUMANN, L AND GHELLAB, Y '*Works councils examined'* (2004) at http://www.eurofound.europa.eu/eiro/2004/01/feature/hu0401106f.htm (last visited on July 23, 2014)

227 TÓTH, A '*The Inventions of Works Council in Hungary'* 3 European Journal of Industrial Relations 2, 161-81

228 TÓTH, A *'Üzemi tanácsok, szakszervezetek és munkáltatók*' available at http://econ.core.hu/kiadvany/csopak/7.pdf;

229 TOYODA, M '*Protective labor legislation and gender equality - The imapct of the occupation on Japanese working women'* (2007) in Caprio, M E and Sugita, Y (eds) (2007)

230 TRIOMPHE, C E, GUYET, R AND TARREN, D '*Social Dialogue in Times of Global Economic Crises*' (Eurofund, 2010)

231 TSUNEKI, A AND MATSUNAKA, M '*Labor Relations and Labour Law in Japan'* (Institute of Social and Economic Research Oska University, 2008) Discussion Paper No.724

232 TSUZUKI, C '*The Pursuit of Power in Modern Japan 1825-1995'* (Oxford University Press, 2000)

233 TURNER, C '*Democratic Consciousness in Japanese Unions'* in Ishida, T and Krauss, E S (eds) (1989)

234 TURNER, L. '*Participation, democracy and efficiency in the US workplace'* (1997) 4 Industrial Relations Journal

235 UEMURA, S, KIHARA, A, OH, H-S, HIRASAWA, J, NAITO, S '*Shrinking of Labour Unions and Need for a New Collective Influential Voice System in Japan*' in JILPT Labour Situation in Japan an Analysis: Detailed Exposition 2009/2010

236 WALKER, K F '*Workers' participation in management. Problems, practices and prospects'* (1975) 12 International Institute for Labour Studies Bulletin

237 WATANABE, S '*The Japanese quality control circle: Why it works'* (1991) 130 Int'l Lab. Rev. 57

238 WEBB, S AND WEBB B '*Industrial Democracy'* (London, 1897)

239 WEDDERBURN, L '*The Land of industrial Democracy'* (1977) 6 Industrial Law Journal, 68-89

240 WEISS, M '*Workers' Participation in the European Union'*, in P Davies et al, (eds) *European Community Labour Law, Principles and Perspectives* (Oxford, 1996)

241 WEISS, M 'Workers' Participation: A crucial topic of EU' in, R Hoffmann, O Jacobi, B Keller and M Weiss (eds), *European Integration as a Social Experiment in a Globalized World* (Düsseldorf, 2003)

242 WEISS, M '*The effectiveness of labour law: reflections based on the German experience'* (2006) 48 Managerial Law, 3, 275-87.

243 WEISS, M. '*Convergence and/or Divergence in Labor Law Systems?: A European Perspective'* (2006-2007) 28 Comp. Lab. L. & Pol'y J.

244 WEISS, M. '*Workers' Participation: Its development in the European Union'* (2000) 21 Indus L. J. Juta.

245 WELTNER, A '*A szocialista munkajogviszony, üzemi demokrácia és munkajog 1-2'* [Employment relationship in socialism, workplace democracy and labour law 1-2 (CSc dissertation)] (1961, manuscript)

246 WELTNER, A '*A magyar munkajog'* [Hungarian Labour Law] (Budapest, 1978, Akadémiai Kiadó)

247 WICKSTROM, G AND BENDIX, T '*The Hawthorne effect'* (2000) Scandinavian Journal of work, environment and health

248 WILLIAMSON, OE, '*The Economic Institutions of Capitalism'* (1987) 32 Administrative Science Quarterly 4

249 WOODIWISS, A '*Law, Labour and Society in Japan - From repression to reluctant recognition*' (Routlege, 1992)

250 YUKIO, O '*The Voice of Japanese Democracy Being an on Constitutional Loyalty'* (1918)

251 ZERK, J *'Multinationals and Corporate Social Responsibility'* (Cambridge, 2006, CUP)

252 ZHOU, OSIHI, UEDA *'Childcare System in Japan'* (2003) 1 Journal of Population and Social Security, vol.1. Journal of Population and Social Security (Population), Supplement to vol 1.

Hungler Sára

THE DUAL NATURE OF EMPLOYEE INVOLVEMENT

(A MUNKAVÁLLALÓI RÉSZÉVTEL KETTŐS TERMÉSZETE)

című doktori értekezésének tézisei

Témavezető: Dr. Lehoczkyné Dr. Kollonay Csilla

ELTE Állam és Jogtudományi Kar

Munkajogi és Szocális Jogi Tanszék

Budapest, 2014

I A kutatási feladat rövid összefoglalása

A munkavállalói részvétel alatt olyan, egymástól különböző mechanizmusokat értünk, amelyek lehetővé teszik, hogy a munkavállalók befolyásolják a munkahelyi döntési folyamatokat. A részvétel a munkahely bármely szintjén lehetséges, számos közvetlen és közvetett formája létezik. A munkavállalói részvétel témaköre egyaránt foglalkoztatja a közgazdaságtan és a jogtudomány művelőit, fontos eleme a munkaügyi kapcsolatok jogának is. A dolgozat a munkavállalói részvételre mint kettős természetű jelenségre tekint, egyrészt vállalati versenyképességet fokozó eszközként, másrészt olyan emberi jogként, amely jelentősen hozzájárul az emberi méltóság kiteljesítéséhez. Korábbi kutatások eredményeit felhasználva ezt a kettősséget elsősorban a közvetlen képviselet területén mutatom ki és elemzem. A dolgozat legfontosabb megállapítása, hogy e két komponens egymástól nem elválasztható.

A kutatás kezdetén az alábbi hipotéziseket állítottam fel:

H1 A MUNKAVÁLLALÓI RÉSZVÉTEL KETTŐS TERMÉSZETŰ, EGYSZERRE VERSENYKÉPESSÉGET NÖVELŐ GAZDASÁGI ESZKÖZ ÉS EMBERI JOG.

H2 EMBERI JOGI TERMÉSZETÉBŐL FAKADÓAN A MUNKAVÁLLALÓI RÉSZVÉTEL UNIVERZÁLIS, NEM ÉRTELMEZHETŐ KIZÁRÓLAG AZ EURÓPAI MUNKAVÁLLALÓK PRIVILÉGIUMAKÉNT, KITERJESZTÉSE ÉS VÉDELME ÉRDEKÉBEN MEGFELELŐ JOGI ESZKÖZÖKET KELL IGÉNYBE VENNI.

H3 MUNKAVÁLLALÓI RÉSZVÉTEL NEM JÖHET LÉTRE EGYÉNI AUTONÓMIA HIÁNYÁBAN, EZÉRT FONTOS, HOGY EGYIDEJŰLEG ISMERJÜK EL AZ EGYÉNI SZABADSÁG KÖZPONTI SZEREPÉT ÉS A TÁRSADALMI HATÁSOKNAK AZ EGYÉNI SZABADSÁGRA GYAKOROLT EREJÉT.

A dolgozat a hipotéziseket az alábbi szerkezetbe foglaltan igazolja. Az első rész a részvétel fogalmát határozza meg, ehhez kapcsolódóan kitekintést nyújt a gazdasági demokráciával és a munkaügyi kapcsolatok demokráciájával foglalkozó elméletekre is. A bevezető feldolgozza az ILO adott témakörre vonatkozó definícióját és az Európai Unió fogalom-meghatározásait is. Az első rész ismerteti a hipotéziseket és a kutatási kérdéseket, valamint a feldolgozás módszertanát.

A második rész a munkavállalói részvétel kettős természetének eredetét mutatja be, rövid áttekintést adva a Weimari Köztársaság participációra vonatkozó koncepciójáról, illetve azokról a kurrens közgazdaságtani elméletekről, amelyek a munkavállalói részvételt mint gazdasági versenyképességet befolyásoló tényezőt elemzik, akár pozitív, akár negatív oldalról. A második rész részletesen bemutatja a munkavállalói részvételt inkorporáló emberi jogi dokumentumokat.

A harmadik rész a részvétel európai dimenziójára összpontosít. Először azokat az irányelveket mutatom be röviden, amelyek a részvétel általános szabályait rögzítik, így a 2002/14/EK irányelvet a munkavállalók tájékoztatásáról és a velük való konzultációról, az Európai Üzemi Tanács létrehozásáról szóló 2009/38/EK átdolgozott irányelvet, illetve az európai részvénytársaság statútumának a munkavállalói részvétel tekintetében történő kiegészítéséről szóló 2001/86/EK irányelvet. Ezt követően bemutatom, hogy milyen lehetőség kínálkozna az uniós jogalkotás számára annak érdekében, hogy a munkavállalói részvétel joga ne csupán az európai unió területén dolgozó munkavállalók privilégiuma legyen. Érvelésem központi eleme, hogy bár az extraterritoriális jogalkotás megítélése ellentmondásos akár az Európai Unión belül is, bizonyos célok érdekében sikerrel fordult az EU ehhez a politikához, amely a részvétel kiterjesztése szempontjából is megfontolandó lehet. Ez a rész fogalmazza meg a dolgozat normatív javaslatát is, amely a 2002/14/EK és a 2009/38/EK irányelvek személyi hatályának kiterjesztésére tett javaslat. Ezután részletesen bemutatom az új Munka Törvénykönyvének (2012. évi I. törvény) a munkavállalói részvételt érintő változásait, összehasonlítva azt a korábbi szabályozással. Az elemzés célja, hogy a megvizsgálja a magyar szabályoknak az uniós irányelvekkel, illetve az Európai Szociális Chartával való megfelelőségét. Ebben a körben a jogalkotási javaslatom az üzemi tanács (üzemi megbízott) törvényben foglalt jogainak megsértésével hozott munkáltatói intézkedések erőteljesebb, a jogsértéstől visszatartó erejű szankcióval való sújtása: az érvénytelenség jogkövetkezményeinek alkalmazása, illetve pénzbírság kiszabása. Szükséges a munkavállalói képviselők munkajogi védelmének helyreállítása is, hiszen a jelenlegi szabályozással hazánk nemzetközi normát sért. Szükséges lenne továbbá a munkavállalók képviseletének átgondolása a csoportos létszámleépítés és a munkajogi jogutódlás kapcsán is, e területeken a munkavállalókkal való konzultációt az üzemi tanács meglétéhez kötni aggályos.

A dolgozat negyedik része a munkavállalói részvétel japán modelljét az államszocializmus magyar szabályait vizsgálja. Az elemzés célja, hogy kimutassa, a politikai, gazdasági és társadalmi közegnek, illetve a demokráciáról vallott társadalmi felfogásnak a

munkavállalói részvételre gyakorolt hatását. Az értekezés ötödik, befejező része összefoglalja a kutatás eredményeit.

II A kutatás módszertana

A munkavállalói részvétel fogalmának meghatározásához harmadlagos forrásokat használtam, így különösen a témával foglalkozó enciklopédiákat és szótárakat. Ebből nyilvánvalóvá vált, hogy a részvétel fogalma úgy munkajogi, mint emberi jogi szempontból részletesen feldolgozott. A kutatás legfontosabb elsődleges forrásai az egyes munkavállalói részvételi modellek keretét biztosító jogszabályok és egyéb jogi instrumentumok. A dolgozat a sorra veszi a weimari, a japán és a magyar participáció fejlődését azt meghatározó joganyag feldolgozásával és bemutatásával. Az egyes participációs intézmények funkciójuk alapján kerülnek összehasonlításra. A disszertáció a nemzeti jogokon túl az Európai Unió joganyagát is elemzi, valamint feldolgozza a releváns nemzetközi jogi instrumentumok rendelkezéseit is. Az egyes intézmények funkciójának értelmezéséhez további elsődleges forrásokat is igénybe vettem, így elsősorban nemzeti bírósági ítéleteket, illetve az Európai Unió Bíróságának döntéseit és az Európai Szociális Charta esetjogát.

A kutatás során ugyanakkor célul tűztem ki, hogy a munkavállalói részvételt új oldalról közelítsem meg, amely túlmutat a korábbi kutatási eredmények összefoglaló ismertetésén, és annak társadalmi és gazdasági hatásait is bemutatja. Annál is inkább, mert a gazdasági válság hatására a participáció különböző formái ismét a kutatások középpontjába kerültek, mint a válság negatív hatásait enyhítő lehetséges eszközök. Ennek érdekében nemcsak a participáció jogszabályi hátterét mutatom be, hanem elsősorban másodlagos források segítségével igyekszem az egyes munkavállalói részvételi modelleket azok társadalmi és gazdasági közegében is elhelyezni. A magyar történeti háttér bemutatásakor ugyanakkor nagyban támaszkodtam elsődleges forrásokra is, így a Szakszervezeti Levéltár anyagára és a Politikatörténeti Intézetben fellelhető archív dokumentumokra.

A kutatás interdiszciplináris megközelítése elengedhetetlenné tette, hogy a participációt ne csupán jogi, hanem gazdaságtudományi szempontból is megvizsgáljam. Ugyanakkor a disszertáció egy jogtudományi kutatás eredményeit foglalja össze, így a

dolgozat a participációra vonatkozó, közgazdaságtudományban használt matematikai bizonyításokat nem mutatja be.

III A tudományos eredmények rövid összefoglalása és azok hasznosítása, illetve a hasznosítás lehetőségei

A A tudományos eredmények rövid összefoglalása

A kutatás az alábbi hipotézisekre épül:

H1 A MUNKAVÁLLALÓI RÉSZVÉTEL KETTŐS TERMÉSZETŰ, EGYSZERRE VERSENYKÉPESSÉGET NÖVELŐ GAZDASÁGI ESZKÖZ ÉS EMBERI JOG.

H2 EMBERI JOGI TERMÉSZETÉBŐL FAKADÓAN A MUNKAVÁLLALÓI RÉSZVÉTEL UNIVERZÁLIS, NEM ÉRTELMEZHETŐ KIZÁRÓLAG AZ EURÓPAI MUNKAVÁLLALÓK PRIVILÉGIUMAKÉNT, KITERJESZTÉSE ÉS VÉDELME ÉRDEKÉBEN MEGFELELŐ JOGI ESZKÖZÖKET KELL IGÉNYBE VENNI.

H3 MUNKAVÁLLALÓI RÉSZVÉTEL NEM JÖHET LÉTRE EGYÉNI AUTONÓMIA HIÁNYÁBAN, EZÉRT FONTOS, HOGY EGYIDEJŰLEG ISMERJÜK EL AZ EGYÉNI SZABADSÁG KÖZPONTI SZEREPÉT ÉS A TÁRSADALMI HATÁSOKNAK AZ EGYÉNI SZABADSÁGRA GYAKOROLT EREJÉT.

A politikai demokrácia és a gazdasági fejlődés egymástól történő szétválaszthatóságát hirdető elméleteket mára meghaladottaknak mondhatjuk. A paradigmaváltás elsősorban a jóléti közgazdaságtant megújító fejlődés-elméleteknek vagy képesség-elméleteknek köszönhető.[957] Ezen elméletek képviselői szerint a társadalmi egyenlőtlenségek kezelése nem képzelhető el a demokrácia és a gazdasági fellendülést egymástól szétválasztó, hagyományos dichotómiára

[957] M C Nussbaum, 'Creating Capabilities' (Cambridge, 2011, Harvard University Press).

építve, ezért olyan új szemlélet bevezetése szükséges, amely az emberi méltóságot helyezi középpontba, ugyanis a gazdasági mutatók javulása önmagában nem eredményezi a szegénység, a diszkrimináció megszűnését vagy a várható élettartam növekedését. A megszokott, a piaci szabadversenyt a tervutasítással szembeállító, leegyszerűsítő szemléletmód, amely erősen jellemzi a neoklasszikus közgazdaságtan főáramát, nem tudott megfelelő választ adni a növekvő GDP ellenére fennmaradó gazdasági-társadalmi problémákra. A fejlődést tehát nem lehet önmagában a növekvő termelésben és fogyasztásban és az emelkedő reáljövedelemben meghatározni, mivel az sokkal inkább az úgynevezett emberi képességek kiteljesítésének folyamataként értelmezendő és nem feleltethetők meg egymással a gazdasági prosperitás hagyományos fogalmával. Amartya Sen a képességek fogalmán keresztül köti össze a szabadságot és egy egyéni kiteljesedést, érvelése szerint a fejlődés és az életminőség összefügg azzal, hogy egy adott személy milyen lehetőségek közül választhat egy adott társadalomban.[958]

Az egyéni szabadság – ide értve a döntéshozatalban való részvétel lehetőségét is – elismerése hiányában nem képzelhető el valódi gazdasági fejlődés sem, a gazdasági és a politikai demokrácia egymással szorosan összefügg.[959] Ebből következik a kutatás első hipotézise:

H1 A MUNKAVÁLLALÓI RÉSZVÉTEL KETTŐS TERMÉSZETŰ, EGYSZERRE VERSENYKÉPESSÉGET NÖVELŐ GAZDASÁGI ESZKÖZ ÉS EMBERI JOG.

Az első hipotézis alátámasztására az alábbi kutatási kérdéseket fogalmaztam meg: (Q1) *Melyek a munkavállalói részvétellel foglalkozó legmeghatározóbb közgazdaságtudományi elméletek?* (Q2) *Hogyan jelenik meg a munkavállalói részvétel emberi jogi instrumentumokban?* (Q3) *Milyen szerepet játszik a munkavállalói részvétel a gazdasági válság negatív jelenségeinek leküzdésében?*

A munkavállalói részvételnek a gazdasági versenyképességre gyakorolt pozitív hatása vitatott.[960] A döntéshozatali eljárások természetesen nagyban befolyásolják a gazdasági

[958] A Sen, Development as Freedom (Oxford, 1999, OUP), 8.
[959] Hugo Sinzheimer, *Das Wesen des Arbeitsrecht*, in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (1976); Hugo Sinzheimer, *Eine Theorie des Sozialen Rechts (1936)* XIV Zeitschrift für öffentliches Recht.
[960] Például, Michael C. Jensen and William H Meckling, '*Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure'*, Journal of Financial Economics, October, 1976; E. F. Fama and M. C. Jensen, *Separation of Ownership and Control*, Journal of Law and Economics, Vol. 26. No. 2, 1983; R. B. Freeman and E. P. Lazear, *An Economic Analysis of Works Councils, in Works Councils: Consultation, Representation, and Cooperation in Industrial Relation.*

társaságok dinamikáját: minél több szereplőt vonunk be, annál több időre van szükség a döntés meghozatalára, így az egész eljárás drágább lesz. A hatékonyság-elméletek képviselőinek érvelése szerint a munkavállalói részvétel a tulajdonosok érdekeivel ellentétes, mivel számukra a legkedvezőbb az, ha az adott termék vagy szolgáltatás előállítása, illetve nyújtása a legköltséghatékonyabban történik. Ennek cáfolatára számos olyan elmélet született, amelyek költségnövekedés ellenére a részvétel pozitív hatása mellett érvelnek. Ezek közül a dolgozat az útfüggőség elméletét, a tulajdonhoz és az emberi tőke koncepciójához kapcsolódó okfejtéseket, valamint a behaviorista közgazdaságtan eredményeit mutatja be részletesebben.

Az évtizedes elméleti vita mellett nem elhanyagolhatók a gyakorlati kutatások eredményei. A 2007-ben kezdődő gazdasági válság hatásai igen hamar megmutatkoztak a munka világában is,[961] mintegy rákényszerítve a szociális partnereket arra, hogy együttes erővel lépjenek fel a válság kezelése érdekében.[962] Ez a gazdasági kényszer több kutatás alapjául szolgált az elmúlt években, és annak ellenére, hogy ezek eredményei egymással nem minden tekintetben összevethetők, mégis megállapítható a szociális párbeszéd (ide értve a munkahelyi szintű részvételt is) pozitív összefüggése a válság sikeres kezelésével.[963]

A munkavállalói részvétel emberi jogi természetének vizsgálatakor Hugo Sinzheimernek a politikai, gazdasági és társadalmi demokrácia összefüggéseire vonatkozó elméletéből indultam ki, amelyek összekapcsolhatók Amartya Sen fentebb már ismertetett gondolataival is. További fontos elméleti alapot adott Lehoczkyné Kollonay Csilla megállapítása, amely az élet alapvető kérdéseit érintő demokratikus döntéshozatalt alapvető emberi jognak tekinti, amely lehetővé teszi, hogy az egyének ne a döntések tárgyai, hanem azok aktív alakítói legyenek.[964]

Annak ellenére, hogy a munkavállalói részvétel megjelenik emberi jogi dokumentumokban, így az Európai Szociális Chartában és az Európai Unió Emberi Jogi Chartájában, elismertségük mégis nagyban függ egy adott állam politikai berendezkedésétől. További figyelmet érdemel, hogy kizárólag európai emberi jogi instrumentumok

---

[960] A. A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J Poll. Econ. 211, 1950

[961] A munkanélküliségi ráta 7.4 százalékról (2007) egy even belül 7.7 százalékra ugrott 2008 októberére. Ld, European Commission, Economic forecast, Spring 2008, 1 European Economy.

[962] S Cluwaert, I Schömann and W Warneck (2010), 'The European interprofessional and sectoral social dialogues and the economic crisis' in *Benchmarking Working Europe 2010* (Brussels, 2010, ETUI), 75.

[963] C E Triomphe, R Guyet and D Tarren, 'Social Dialogue in Times of Global Economic Crises' (Eurofund, 2010), V Glasner and B Galgóczy, 'Plant-level responses to the economic crisis in Europe (ETUI-REHS, 2009), I Guardiancich (ed) 'Recovering from the crisis through social dialogue in the new EU Member States: the case of Bulgaria, the Czech Republic, Poland and Slovenia' (ILO (EC), 2010); B Segol, M Jepsen and P Pechet (eds) Benchmarking Working Europe 2014 (ETUI-ETUC, 2014,).

[964] Cs Kollonay-Lehoczky 'The fundamental Right of Workers to Information and Consultation under the European Social Charter' in Dorssemont and Blanke (eds) 'The Recast of the European Works Council Directive (Intersentia, 2010) 3-4; emphasis in origin.

rendelkeznek a részvételről, annak ellenére, hogy az ILO és az OECD is erőfeszítéseket tesz a szélesebb körű elismertség érdekében.

Amint azt a dolgozat is bemutatja, a munkavállalói részvétel kihatással van a gazdasági versenyképességre – akár pozitív, akár a negatív értelemben tekintünk az összefüggésre. Ugyanakkor, ahogy erre Sen is rámutatott, az emberi jogok és demokrácia olyan princípiumok, amelyek minden körülmény között védelmet kell, hogy élvezzenek, függetlenül attól, hogy kapcsolódik-e hozzájuk pozitív gazdasági hatás.[965]

Ebben az összefüggésben az egyén életét érintő döntésekben való részvétel egyben szabadság, amely értékessé teszi az emberi életet és a döntési lehetőségeken keresztül lehetővé teszi az egyéni elképzelések pluralitását és a választásainkért vállalt egyéni felelősséget. Ebből következik a dolgozat második hipotézise:

H2 EMBERI JOGI TERMÉSZETÉBŐL FAKADÓAN A MUNKAVÁLLALÓI RÉSZVÉTEL UNIVERZÁLIS, NEM ÉRTELMEZHETŐ KIZÁRÓLAG AZ EURÓPAI MUNKAVÁLLALÓK PRIVILÉGIUMAKÉNT, KITERJESZTÉSE ÉS VÉDELME ÉRDEKÉBEN MEGFELELŐ JOGI ESZKÖZÖKET KELL IGÉNYBE VENNI.

Kollonay szerint az emberi méltóság és a szociális demokrácia védelme megköveteli, hogy az emberi jogokat az államok a magánjogi jellegű jogviszonyokban is, amilyen például a munkaviszony is, védelemben részesítsék. Az emberi jogi egyezményeknek és az Európai Unió vonatkozó irányelveinek áttekintése után a következő kutatási kérdést fogalmaztam meg: (Q4) *Amennyiben a munkavállalói részvételt emberi jognak tekintjük, és ekképpen univerzális értékként fogjuk fel, milyen eszközök állnak rendelkezésünkre ahhoz, hogy érvényesülését az európai térségen kívül is biztosítsuk?*

Az ILO és az OECD eszközrendszerének bemutatását követően a nem állami szereplők eszközrendszerét elemeztem. A kutatási kérdésre azt a válasz adható, hogy kikényszeríthető jogszabályi rendelkezések hiányában a munkavállalói részvétel lehetősége nem biztosított. A *soft law* eszközök, bár szerepük különösen a multinacionális vállalatoknál kétségtelenül fontos, mivel a piac egyre inkább számon kéri az emberi jogok érvényesülését a vállalati politikában, mégsem képesek betölteni a szabályozási űrt.

Az Európai Unió a munkavállalói részvétel általános kérdéseit három alapvető jelentőségű irányelvben szabályozza, ezek az Európai Közösség munkavállalóinak tájékoztatása és a velük folytatott konzultáció általános keretének létrehozásáról szóló

[965] A Sen, Development as Freedom (Oxford), 3, 16.

2002/14/EK irányelv, az Európai Üzemi Tanács létrehozásáról vagy a közösségi szintű vállalkozások és vállalkozáscsoportok munkavállalóinak tájékoztatását és a velük folytatott konzultációt szolgáló eljárás kialakításáról szóló 2009/38/EK irányelv és az európai részvénytársaság statútumának a munkavállalói részvétel tekintetében történő kiegészítéséről szóló 2001/86/EK irányelv.

Az irányelvek természetesen az európai gazdasági térségen belüli tevékenységre vonatkozóan állapítanak meg szabályokat, de felmerül a kérdés, hogy *lehetőség lenne-e arra, hogy az Európai Unió fellépjen a munkavállalói részvételnek a kiterjesztésének érdekében?* (Q5) Ennek azért lehet kiemelt szerepe, mert számos multinacionális vállalat köszönheti profitabilitását az Európán kívül folytatott tevékenységének, mégpedig gyakran kihasználva a harmadik állam gyengébb védelmet biztosító munkajogi szabályozását, illetve az itt dolgozó munkavállalók kiszolgáltatott helyzetét.

A harmadik országok munkavállalóinak védelme azonban ezen államok szuverenitását sértheti, és a területen kívüli joghatóság problematikáját veti fel. Ennek megítélése pedig ellentmondásokkal terhes az Európai Unión belül is. A nemzetközi jog korlátozott esetekben lehetővé teszi a területen kívüli joghatóságot, ennek elméleti alapja a szabályozandó kérdés függvénye.[966] Ennek alapul vételével megvizsgáltam, hogy lehetséges lenne-e a 2002/14/EK és 2009/38/EK irányelvek személyi hatályának kiterjesztése. Az elméletem alátámasztására az Európai Unió környezetvédelmi politikájából mutattam be egy példát, amely véleményem szerint szoros hasonlóságot mutat a munkavállalói részvétel kérdésével, mivel döntésének megalapozásához az Európai Unió Bírósága egyaránt hivatkozik gazdasági és emberi jogi érvekre.

Álláspontom szerint a fenti irányelvek személyi hatályának kiterjesztése hatékonyan hozzájárulna a munkavállalói részvételnek, mint emberi jognak a védelméhez azon munkavállalók esetében, akik európai székhelyű multinacionális vállalatok alkalmazásában, de az EGT-n kívül végeznek munkát. Állításomat az alábbiakra alapozom: az Európai Unió az Európai Üzemi Tanács intézményével egy páratlan keretet hozott létre a transznacionális vállalatok munkavállalóinak tájékoztatására és a velük való konzultációra. Az irányelv hivatkozik a belső piac sajátos működésére, amely maga után vonja a vállalkozások koncentrációjának folyamatát, több országot érintő vállalategyesüléseket, vállalatfelvásárlásokat, közös vállalkozások létrehozását és ebből következően a

[966] Így például a nemzetközi jog lehetővé teszi az államok számára, hogy saját versenyjogi szabályaikat alkalmazzák azokban az esetekben is, amelyekben külföldiek más állam területén elkövetett cselekedetei közvetlen, jelentős és előre láthtó hatással bírnak az érintett államra (ld. *A. Ahlstrom Oy v. Commission* [1988], 4 CMLR 901).

vállalkozások és vállalkozáscsoportok transznacionálissá válását. A gazdasági tevékenységek harmonikus fejlődése szükségessé teszi, hogy a két vagy több tagállamban működő vállalkozások és vállalkozáscsoportok tájékoztassák a döntéseik által érintett munkavállalók képviselőit, és velük konzultáljanak. Az irányelv lehetővé teszi, hogy a közösségi szintű vállalkozások munkavállalói megfelelő tájékoztatást kapjanak és konzultáljanak velük, amikor az őket érintő döntést nem abban a tagállamban hozzák, amelyben őket foglalkoztatják. Ugyanakkor a globális gazdaságban a multinacionális vállalatok munkavállalóira nem csak a belső piac, hanem a társaságoknak a harmadik országokban folytatott tevékenysége is kihatással van, indokoltnak látszik tehát, hogy ezek a munkavállalók kölcsönösen értesüljenek a multinacionális vállalatok őket érintő gazdasági döntéseiről. A tájékoztatásra és a konzultációra vonatkozó szabályozást a 2002/14/EK irányelv tartalmazza, így az ebben foglalt munkavállalói jogok az üzemi tanács kiterjesztett intézményén keresztül érvényesülhetnének.

A személyi hatály kiterjesztésére vonatkozó javaslatnál különösen az alábbiakat vettem figyelembe. 1) A 2009/38/EK irányelvnek az ellenőrző vállalkozásra vonatkozó meghatározása. A 2009/38/EK irányelv alkalmazásában az „ellenőrző vállalkozás” olyan vállalkozást jelent, amely a tulajdonviszonyokból, a pénzügyi részesedésből, illetve az irányítás szabályaiból eredően meghatározó befolyást gyakorol egy másik vállalkozásra („ellenőrzött vállalkozás”). A meghatározó befolyás kifejtésének képességét vélelmezni kell – az ellenkező bizonyításának sérelme nélkül –, ha valamely vállalkozás egy másik tekintetében közvetve vagy közvetlenül: a) birtokolja a szóban forgó vállalkozás jegyzett tőkéjének a többségét; b) ellenőrzi a vállalkozás kibocsátott részvénytőkéjéhez tartozó szavazatoknak a többségét; vagy c) kinevezheti a szóban forgó vállalkozás igazgatási, irányító vagy felügyelő testületei tagjainak több mint a felét. Ezek a feltételek nagy valószínűséggel fennállnak az európai székhelyű multinacionális vállalatok harmadik országban lévő telephelyeinek esetében is, így állíthatjuk, hogy az ellenőrzési kapcsolat létrejön közöttük.

2) Az irányelv meghatározása a transznacionális jelentőségű ügyek tekintetében. Ennek alapján transznacionálisnak tekintendő minden olyan kérdés, amely a közösségi szintű vállalkozást vagy közösségi szintű vállalkozáscsoportot összességében, illetve ennek két különböző tagállamban található legalább két telephelyét vagy vállalkozáscsoportjához tartozó vállalkozását érinti. A globális gazdaságban ez a feltétel a fentiekben kifejtettek alapján az Európán kívüli országokban található telephelyekre is teljesül.

3) A 2009/38/EK irányelv hatálya kiterjed azokra a tagállami telephelyekre is, amelyek esetében a központi irányítás nem tagállamban működik. Ennek alapján tehát

azoknak a gazdasági társaságoknak, amelyeknek az Európai Unió kívül van a központi irányításuk – az irányelvben foglalt egyéb feltételek teljesülése mellett – kötelességük tiszteletben tartani az európai polgároknak a tájékoztatáshoz és konzultációhoz való jogát.

Amennyiben nem vitatjuk a munkavállalói részvétel emberi jogi természetét, felmerül a kérdés, hogy a „másik irányban", azaz amikor a központi irányítás valamely tagállamban működik, de a munkavállaló nem tagállami telephelyen dolgozik, akkor miért nem ismerjük el ugyan ennek a jognak az érvényességét? A dolgozat kiindulópontja az emberi jogok univerzalitása, ezért véleményem szerint a munkavállalói részvétel jogára nem lehet az Európai Unió polgárainak kizárólagos jogaként tekinteni, annak kiterjesztése a lehető legszélesebb körben indokolt, így az Európai Uniónak szükséges élnie azokkal a lehetőségekkel, amelyek ezt bármilyen módon elősegítik.

Ellenérvéként felhozható, hogy egy ilyen intézkedés hatalmas költségeket okozna a gazdasági társaságoknak, így komoly piaci hátrányt szenvednének. Ezért ahelyett, hogy a részvételi jogokat szélesítené, egy ilyen szabályozás inkább arra ösztönözné a vállalatokat, hogy székhelyüket az Európai Unión kívülre helyezzék át. Egyfelől, ha hihetünk az ismertetett empirikus kutatásoknak, illetve az irányelv bevezetőjében foglaltaknak, akkor a részvételi jogok kiterjesztése inkább tovább fokozná a versenykepességet. A székhelyáthelyezés pedig ugyancsak költséges lépés, nem is beszélve az esetleges befektetői és fogyasztói bizalomvesztésről, amely egy ilyen döntéssel járhat.

Ugyanakkor arról sem szabad megfeledkezni, hogy a 2002/14/EK és a 2009/38/EK irányelveknek számos problémás pontjuk van. Az Európai Unió szabályozási koncepciójának változása nemcsak azt eredményezte, hogy több évtizedes holtpont után végül sikerült elfogadtatni a szabályokat, hanem azt is, hogy a nagyobb tagállami mozgástér a szabályok átültetésében egyenlőtlenségekhez vezetett. A rugalmas szabályozás lehetővé teszi, hogy a tagállamok saját nemzeti joguknak és/vagy gyakorlatuknak megfelelően határozzanak meg bizonyos fogalmakat, így akár ugyanazon a vállalkozáson, illetve vállalkozáscsoporton belül is eltérő bánásmódban részesülhetnek a munkavállalók. Ezek közül a problémás területek közül elsősorban az üzleti titok fogalmát, a munkavállalói jogok megsértése esetén alkalmazandó szankciókat és a munkavállalói képviselők védelmének a körét emeltem ki a dolgozatban. Ezek a problémák nyilvánvalóan „továbböröklődnének" és feltehetően eszkalálódnának is abban az esetben, ha az irányelvek személyi hatályát kiterjesztenénk.

A magyar munkajogi szabályok újraalkotása felvetette annak kérdését, hogy a 2012. évi I. törvény, *a Munka Törvénykönyvének a munkavállalói részvételre vonatkozó rendelkezései megfelelnek-e az európai követelményeknek, így az Európai Szociális Charta*

rendelkezéseinek és az Európai Unió vonatkozó irányelveinek? (Q6) Annak ellenére, hogy az új Munka Törvénykönyve továbbra is elkötelezett a munkavállalói részvétel demokratikus értéke mellett, a vizsgálataim több ponton rámutattak arra, hogy az új szabályok nem minden esetben felelnek meg az európai elvárásoknak.

Az új Mt. sikeresen kezelte a korábbi szabályozás számos ellentmondásos kérdését, így szétválasztotta az üzemi tanács és a szakszervezetek egymással párhuzamos, esetenként egymást potenciálisan gyengítő jogosítványait. Az új szabályozás látszólag az üzemi tanács intézményét preferálja a szakszervezetekkel szemben, azonban a jogalkotó szándéka inkább a szakszervezetek meggyengítésében, mintsem az üzemi tanács megerősítésében érhető tetten. Az üzemi tanács nem szerezett a korábbinál erősebb jogosítványokat, sőt, bizonyos szempontból a korábbihoz képest inkább gyengült az üzemi tanácsok pozíciója. Mindenképpen kiemelést érdemel, hogy a jogszabály már nem fűzi az érvénytelenség jogkövetkezményét az üzemi tanács (üzemi megbízott) együttdöntési jogainak megsértésével hozott munkáltatói intézkedéshez. Ezen kívül lényeges, negatív változás, hogy míg korábban az üzemi tanács valamennyi tagja munkajogi védelmet élvezett, az új szabályozás a védelmet az üzemi tanács elnökére korlátozza. Ezek az új szabályok alapvetően érintik az üzemi tanács működését, annak a munkáltató szemében elfoglalt szerepét és súlyát. Az üzemi tanács jogainak megsértése esetére kilátásba helyezett szankcióknak megfelelően elrettentő hatásúnak kell lenniük, különben nem biztosított a munkavállalók emberi jogának adekvát védelme.[967] Megfelelő szankciók nélkül az üzemi tanács nem a munkavállalói részvétel eszköze, hanem a munkáltatói intézkedések pecsétnyomója lesz. A munkajogi védelem személyi körének szűkítése egyértelműen ellentmond az Európai Szociális Charta 22. cikkelyének, a 2002/14/EK irányelv rendelkezéseinek, illetve az ILO 135. számú egyezményében foglaltaknak.

Fontos kiemelni azt is, hogy az új Mt. az üzemi tanács feladataként a munkaviszonyra vonatkozó szabályok megtartásának figyelemmel kísérését jelöli meg. Ez a munkavállalói részvétel intézményének a jogalkotó általi teljes félreértésére enged következtetni. Mindezek a szabályok sajnálatosan hozzájárultak ahhoz, hogy a hazai kollektív munkajogi szabályozás, illetve a szociális párbeszéd kabaréba illő fordulatot vett.[968]

---

[967] Kollonay, supra, 30.

[968] Most notably Act XCIII of 2011 on the National Economic and Social Council (*Nemzeti Gazdasági és Társadalmi Tanács*), which abolished tripartite social dialogue in Hungary, or, as a matter of fact, social dialogue *per se*. Another example could be the Permanent Consultation Forum (*Versenyszféra és a Kormány Állandó Konzultációs Fóruma*), which was not even established by a legal instrument.

A doktori értekezés negyedik részében azt vizsgáltam, hogy a társadalmi hatások miként befolyásolják a munkavállalói részvételt. Ennek keretében két részvételi modellt, a japánt és az államszocializmus kori magyar szabályozást vizsgáltam meg. A munkavállalói részvétel társadalmi beágyazottságához kapcsolódik a dolgozat harmadik hipotézise:

H3 MUNKAVÁLLALÓI RÉSZVÉTEL NEM JÖHET LÉTRE AZ EGYÉNI AUTONÓMIA ELISMERÉSE HIÁNYÁBAN, EZÉRT FONTOS, HOGY EGYIDEJŰLEG ISMERJÜK EL AZ EGYÉNI SZABADSÁG KÖZPONTI SZEREPÉT ÉS A TÁRSADALMI HATÁSOKNAK AZ EGYÉNI SZABADSÁGRA GYAKOROLT EREJÉT.

A harmadik hipotézishez kapcsolódó első kutatási kérdés így szólt: (Q7) *Mennyiben befolyásolják a tradicionális döntéshozatali eljárások a munkavállalói részvételt Japánban?* Ennek megválaszolásához először röviden áttekintettem a második világháborút követő demokratizálási folyamatot. Ennek legfontosabb elemének azt tekintem, hogy az amerikai megszállás által oktrojált demokratikus állammodell idegen volt a korábbi berendezkedéstől, annak ellenére, hogy a XIX. században lényeges változásokon keresztül ment keresztül az ország. Ennek türkében az új modell sikere vitatható. A munkaviszonyt, illetve az ahhoz kapcsolódó döntéshozatali mechanizmusokat alapvetően feudális típusú kapcsolatok jellemzik, amelyet a rövid idő alatt, erős külső nyomásra bevezetett, majd félbehagyott reformok nem tudtak megváltoztatni. A japán „gazdasági csoda" régóta elemzések tárgya szerte a világon. A gazdaság ugrásszerűen megnövekedett teljesítőképességét támogatta a szenioritás-alapú, erősen hierarchizált foglalkoztatási modell. Ugyanakkor a jólét növekedése nem hozta magával a társadalom demokratikus átrendeződését. Ez a munkahelyeken is megfigyelhető jelenség, annak ellenére, hogy a jogalkotó támogatóan viszonyult a munkavállalói részvételhez. Az erős alá-fölérendeltségen alapuló, az egyéni szabadság létjogosultságát megkérdőjelező döntési mechanizmusok relativizálják a részvétel jelentőségét.

A második ide kapcsolódó kérdés így hangzott: (Q8) *Létrejöhet-e valódi munkavállalói részvétel autokratikus berendezkedésű rendszerben?* A kérdés megválaszolásához a munkavállalói részvétel magyar szabályozásának változásait elemeztem az 1944 és 1989 közötti időszakban. Magyarországon az 1944 októbere után megváltozott politikai feltételek lehetővé tették, hogy a munkások a vállalatirányításban demokratikusan

választott szerveik, az üzemi tanácsok útján maguk is részt vehessenek. Az üzemi tanácsok az eredeti jogalkotói szándék alapján jelentős potenciálra számíthattak a gazdasági életben, így működésük és vezetőik hamar a Magyar Kommunista Párt érdeklődésének homlokterébe kerültek. A vizsgálat elsősorban levéltári anyagokra alapozva megállapította, hogy a kommunista párt kezdeti célja az üzemi tanácson belüli minél jelentősebb befolyásszerzés volt, azonban a pártvezetőség számára hamar nyilvánvalóvá vált, hogy az intézmény demokratikus természete a hatalomépítésük útjában áll. E felismerést követően nem volt kérdéses, hogy az üzemi tanácsokat fel kell számolniuk. Ugyanakkor a részvétel iránti igény továbbra is megmaradt (nemcsak munkahelyi szinten), így a történeti áttekintésben ezért különös figyelmet szenteltem az 1956-os forradalomban életre hívott munkástanácsoknak. A hivatalos retorikában mindvégig fontos szerep jutott a munkások részvételének a szocialista demokrácia, illetve a gazdaság építésében, azonban a párt mindenre kiterjedő ellenőrzése lehetetlenné tette, hogy azt valóban demokratikus módon gyakorolják a dolgozók.

A japán és a szocialista magyar modell sok tekintetben hasonló. Mindkét rendszer paternalista szemléletű, és előtérbe helyezi a közösség szerepét és jogait az egyénnel szemben. Ez az előnyben részesítés olyan mértékű, hogy az egyéni érdekek érvényre juttatása nem lehetséges. A közösség tágan értelmezhető, lehet a csoport, a brigád, a kollektíva, a munkásság vagy az egész társadalom, a közösséghez tartozás pedig olyan érdek (vagy érték), amely felülírja az egyéni érdeket. További hasonlóság, hogy mindkét rendszer a részvételre kizárólag, mint termelést fokozó eszközre tekint. Sem az szocialista magyar, de még a jelenkori japán rendszer sem rendelkezik egyértelmű, emberi jogi fogalom-meghatározással, így természetszerűen nehezen beszélhetünk azok elismeréséről. Ugyanakkor a részvétel emberi jogi jellegének tagadása vagy fel nem ismerése azt eredményezte, hogy a munkavállalók hosszú távon csalódtak a participáció intézményében, ennek a csalódottságnak pedig jobbára passzivitásukkal adnak hangot vagy egyéni érdekeik érvényesítésére informális csatornákat keresnek, adott esetben azt a hamis látszatot keltve, hogy részvételi jogukra nem tartanak igényt.

A két rendszer hasonlóságainak feltárásával a kutatás eredményei a munkavállalói részvétel szemszögéből igazolják Sen tézisét, amely szerint nem lehet sematikusan szembeállítani a szabadversenyes kapitalizmust a tervgazdasággal és kizárólag a gazdaság növekedésére alapozott adatokra támaszkodva mérni a fejlődést. Sen emlékeztet a szabadság kétféle olvasatára is: a pozitív és a negatív szabadság megkülönbözetésére. A szabadság pozitív értelemben azt jelenti, amit az egyén megtehet vagy elérhet, míg negatív értelemben a korlátozásoknak azt a hiányát jelenti, amelyeket az egyén az állammal vagy egy másik

egyénnel szemben gyakorolhat.[969] Sen rámutat arra is, hogy a negatív szabadság ilyen értelmezése belső feszültségtől terhes, e konfliktus feloldásához új megközelítés szükséges, amely egy adott társadalom vagy gazdaság értékelésekor a szabad választás értékét és annak kiterjedtségét, az egyéni választások pluralitását és a választásokért vállalt felelősséget is figyelembe veszi.[970]

A dolgozat végkövetkeztetései az alábbiakban foglalhatók össze. A munkavállalói részvétel joga egyéni emberi jog, így az minden munkavállalót megillet.[971] Az egyéni jogi jellegből következően olyan rendszerekben, amelyek tagadják vagy megkérdőjelezik az egyéni szabadság létjogosultságát, nem jöhet létre valódi participáció. A részvételnek a termelésre gyakorolt hatása lényeges, de jóval túlmutat azon. A részvétel az egyén szempontjából választási lehetőséget nyújt, és biztosítja, hogy az egyén a saját életével kapcsolatos döntéseket hozzon. Azaz, szabadságot biztosít.

A szabadság a fejlődés nélkülözhetetlen eleme. A participáció európai modelljének – benne a magyar részvételi intézménnyel – sikere két, egymással szorosan összefüggő tényező eredménye. Az egyik, hogy az Európai Unió a részvételre mint kettős intézményre tekint, elismeri az emberi jogi jellegét és egyben a versenyképesség növelésének egyik eszközeként kezeli. A másik a demokrácia iránti elkötelezettség. Demokratikus rendszerekben a részvétel létjogosultsága nem kérdőjeleződik meg. A munkavállalói részvétel emberi jogi jellegének elismerése garancia az emberi méltóság tiszteletben tartására a munkahelyeken.

Csak az egyéni szabadságot tiszteletben tartó és támogató, demokratikus rendszerekben képzelhető a munkavállalói részvételnek az a formája, amely valóban fokozza a munkáltató gazdasági versenyképességét. A munkavállalóknak a döntési folyamatba való bevonása hozzájárul a munkáltató lényegesen nagyobb gazdasági erejével szembeni egyensúly létrehozásához és megtartásához, ezáltal csökkentve a munkavállalók kiszolgáltatottságát. Ezáltal a munkavállalói részvétel hatékony eszköze lehet a szociális igazságosság megvalósításának. Ehhez azonban szükséges, hogy az államok biztosítsák a munkavállalói részvétel gyakorlásához szükséges jogszabályi kereteket, nemcsak az Európai Unión belül, hanem minden munkavállaló elismert jogaként. A munkavállalók emberi méltóságának tiszteletben tartása valamennyiünk közös felelőssége.

---

[969] A Sen,' Freedom of Choice: Concept and Content' (1988), 32 European Economic Review, 269-94.
[970] A Sen, Development as Freedom (Oxford, 1998), 148.
[971] E Ales 'Information and Consultation within the undertaking' *in Recasting Worker Involvement? Recent trends in information, consultation and co-determination or worker representatives in a Europeanized Arena*' (Kluwer, 2009) 13. Similarly, Otto Kahn-Freund argued that the right to strike is an individual right; see, O Kahn-Freund '*The Right to Strike: Its scope and limitations'* (Strasbourg, 1974, Council of Europe), 5 ff.

B A kutatási eredmények várható hasznosítása

A dolgozat eredményeinek gyakorlati jelentőségét több tényező is alátámasztja. Elsőként, hogy a munkavállalók számára alapvető jelentőségű, hogy megértsék, a részvétel miként képes befolyásolni a munkaviszonyukkal kapcsolatos kérdéseket. Lényeges továbbá, hogy tisztában legyenek azzal, hogy a részvétel milyen jogokat és kötelezettségeket foglal magában. Különös tekintettel arra, hogy a dolgozat érvelésének egyik központi eleme, hogy a munkavállalói részvételi jogok egyéni emberi jogok. A kutatás eredményeit remélhetően hasznosnak találják az üzemi tanácsok tagjai és a szakszervezeti tisztségviselők is, akár mindennapi munkájuk során, akár mint a munkavállalói képviselettel kapcsolatos stratégiájuk jövőbeni elemeként.

Másodsorban a munkáltatók számára is hasznos lehet, ha nemcsak a munkavállalói részvétel jogi szabályozásával vannak tisztában, hanem ismerik annak gazdasági és szociális aspektusait is. Annál is inkább, mert a dolgozat rámutatott arra, hogy a részvétel akkor képes igazán betölteni a funkcióját, ha a szereplők maguk is meg vannak győződve annak fontosságáról. Kizárólag formális szabályok érvényre juttatása nem pótolja például a felek meggyőződését a konzultáció szükségességéről vagy a kölcsönös bizalmat. A hasznosulás ezen eleme különösen a multinacionális vállalatok tekintetében lehet jelentős. Jelenleg nincsen olyan kötelező érvényű szabály, amely előírná, hogy a multinacionális vállalatok biztosítsák a részvétel jogát azon munkavallóiknak, akik nem az európai térségben dolgoznak. Ezért a különfajta önkéntes vállalások (vállalati kézikönyvek, CSR politika) szerepe felértékelődik ezen a területen is. Különösen szerencsés lenne, ha a dolgozat eredményei eljuthatnának a társaságok humánpolitikáért felelős munkatársainak kezébe, mivel nekik a vállalatokon belül általában jelentős befolyásuk van a részvétel alakítására.

Harmadsorban a dolgozat rámutatott a magyar Munka Törvénykönyve néhány javításra szoruló rendelkezésére. Az ebben a tekintetben megfogalmazott *de lege ferrenda* javaslatok viszonylag egyszerűen megvalósíthatók lennének, ugyanakkor rendkívül nagy jelentőségük lenne hazánk uniós normáknak és az Európai Szociális Chartának való megfelelése tekintetében. A javaslatok közül a részvételi jogok megsértésével hozott munkáltatói intézkedések megfelelő szankcionálása, illetve az üzemi tanács tagjaira

vonatkozó munkajogi védelem újbóli kiterjesztése a legfontosabbak. Jóval kevesebb reális esélyt látok az uniós szintű normák továbbfejlesztésére. A dolgozat ebben a körben normatív javaslatot fogalmaz meg a 2002/14/EC és a 2009/38/EC irányelvek személyi hatályának kiterjesztésére. Az Európai Uniónak ezáltal lehetősége lenne arra, hogy a munkavállalói részvételi jogokat kiterjessze azokra a munkavállalókra, akik európai székhelyű multinacionális vállalatok Európai Unión kívüli telephelyein dolgoznak.

Végül, de nem utolsó sorban a dolgozat eredményei hozzájárulhatnak a hazai (netán a japán) munkaügyi kapcsolatokat érintő kutatásokhoz, különösen a korábban még fel nem dolgozott archív anyagok. A dolgozat eredményei ezen kívül úgy munkajogi, mint emberi jogi oktatási programokban is hasznosíthatók.

IV A munka témaköréből készült publikációk és előadások jegyzéke

A Publikációk

'Employee Involvement as a Tool to Promote Social Justice' (Munkavállalói részvétel, mint a szociális igazságosság elősegítésének egy eszköze) (2014) IV Studies of Conference of Doctoral Students, Eotvos Lorand University of Sciences, Faculty of Law (*forthcoming*).

*'Munkahelyi Demokrácia Magyarországon 1945-1949' (*Workplace Democracy in Hungary between 1945 and 1949) (2013) 4 Múltunk.

'Munkahelyi Demokrácia Japánban' (Japanese Workplace Democracy) (2013) 2 Themis, 140-176.

'Együtt vagy külön? – Miért nélkülözhetelten a munkavállalói részévétel a gazdasági társaságok irányításában?' (Alone or Together? – Why Employee Participation is indispensable for Corporations?) (2012) III Studies of Conference of Doctoral Students, Eotvos Lorand University of Sciences, Faculty of Law, pp 135-152.

'Recent Changes and Challenges Regarding Employees' Participation Rights in Japan' (Változások a munkavállalói részvétel intézményében Japánban) (2011) Jogi Tanulmányok, ELTE, Faculty of Law and Political Sciences (Budapest, 2011, ELTE) pp 79-91.

B Konferencia előadások

Employee Involvement as a Tool for Social Justice – London School of Economics, London, UK, 2014 August

Munkavállalói részvétel, mint a szociális igazságosság elősegítésének egy eszköze *(Employee Involvement as a Tool to Promote Social Justice)* – ELTE Doctoral Conference, Budapest, Hungary, 2014 June

Social Dialogue in Hungary – Anglia Ruskin University, Cambridge, UK, 2014 April

The Dual Nature of Employee Involvement - Marco Biagi Foundation, Young Scholar Workshop, Modena, Italy, 2014 March

The problem of Extraterritoriality in Labour Relations – Employee Involvement in and Beyond the European Union - Legal Research Network Summer School and Workshop; University of Lille, France, 2013 September

Workplace Democracy in Hungary between 1945 and 1949 - Annual Meeting of the Institute of Political Scientist, Cluj, Romania, 2013 May

Workplace Democracy Revisited – Employee Participation in Japan - Marco Biagi Foundation, Young Scholar Workshop, Modena, Italy, 2013 March